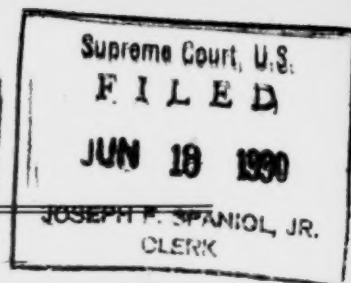


89-2015 (1)



No. \_\_\_\_

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In The  
**Supreme Court of the United States**  
October Term, 1989

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SISSETON-WAHPETON SIOUX TRIBE, of the  
Lake Traverse Indian Reservation, North Dakota  
and South Dakota; DEVILS LAKE SIOUX TRIBE, of the  
Devils Lake Sioux Indian Reservation, North Dakota;  
SISSETON-WAHPETON SIOUX COUNCIL, of the  
Assiniboine and Sioux Tribes of the Fort Peck  
Indian Reservation, Montana,

*Petitioners,*

v.

UNITED STATES OF AMERICA; DONALD P. HODEL,  
Secretary of the Interior; JAMES A. BAKER,  
Secretary of the Treasury,

*Respondents.*

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**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

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*Counsel for Petitioners*

June 20, 1990

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the statute of limitations in 28 U.S.C. sec. 2401(a) applies to judgment enforcement actions.
2. Whether the statute of limitations in 28 U.S.C. sec. 2401(a) applies to actions to enforce judgments awarded under the Indian Claims Commission Act.
3. Whether petitioners' suit was filed within the 6-year period of limitation provided in 28 U.S.C. sec. 2401(a).

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## OPINIONS BELOW

The opinion of the court of appeals (App. 1-16) is reported at 895 F.2d 588. The opinion of the district court (App. 17-47) is reported at 686 F.Supp. 831.

## JURISDICTION

The judgment of the court of appeals was entered on February 2, 1990, and the petition for rehearing was denied on March 5, 1990. (App. 49). The time within which to file the petition for writ of certiorari was extended to and including June 20, 1990 by order of Justice O'Connor entered on May 14, 1990 (App. 48). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Fifth Amendment, Due Process Clause.
2. 25 U.S.C. sec. 70a, para. 2

3. 25 U.S.C. sec. 1300d et seq.  
(selected provisions).
4. 28 U.S.C. sec. 2401(a).

Due to their length, the constitutional and statutory provisions involved are set out in the Appendix (App. 50-53).

#### STATEMENT OF THE CASE

The Government's treatment of the Sioux with respect to the Black Hills is described in this Court's quote of the observation of the Court of Claims that "[a] more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history...." United States v. Sioux Nation, 448 U.S. 371, 388 (1980). While it would be unseemly to take issue with this observation, for the Sisseton and Wahpeton Sioux, this case presents yet another example of a ripe and rank case of Government dishonorable dealings.

This case has its genesis in the failure of the United States to pay just compensation for 27 million acres of land acquired from the Sisseton and Wahpeton Sioux through two 19th century treaties. Some 100 years after these takings, petitioners brought an action for just compensation pursuant to the Indian Claims Commission Act of 1946, 25 U.S.C. sec. 70 et seq. (1976 ed.).<sup>1</sup> After nearly 20 years of litigation, the action was settled by stipulation and final judgment was entered awarding petitioners nearly \$6 million in additional compensation. Sisseton and Wahpeton Bands or Tribes, et al. v. United States, 18 I.C.C. 526-a(1967). In 1968, Congress appropriated money to satisfy this

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<sup>1</sup> Jurisdiction in the district court court was invoked under 28 U.S.C. secs. 1331, 1346(a)(2), 1361, and 1362.

judgment and the funds were deposited in the Treasury in trust for petitioners.

In 1972, Congress apportioned approximately 75% of the judgment fund for the petitioners and 25% for individuals not eligible for membership in any of the petitioner Tribes but having a lineal ancestor who once was a tribal member. See, Act of October 25, 1972, 86 Stat. 1168, 25 U.S.C. sec. 1300d et seq. (App. 50-53). These individuals did not participate in the litigation before the Indian Claims Commission and both the stipulated settlement and the Commission's judgment did not award any portion of the judgment to them.

In 1987, when the Bureau of Indian Affairs indicated that the 25% set aside for the non-member individuals was almost ready for distribution, petitioners commenced this action to block the



distribution and to secure payment of the 25% to the Tribes. Believing the distribution to be nothing less than theft of tribal property and considering the 1972 Distribution Act to be a shameful reenactment of the 19th century takings of tribal property without just compensation, petitioners claimed that the statute violated the Due Process and Takings Clauses of the Fifth Amendment, the Indian Claims Commission Act, and the United States' trust responsibility to petitioners. Petitioners also claimed that none of the prospective individual distributees of the 25% were qualified or eligible, under the 1972 Distribution Act, to share in the judgment fund.

The district court dismissed, holding that the 6-year statute of limitations provided in 28 U.S.C. sec. 2401(a) barred

petitioners' suit.<sup>2</sup> The Ninth Circuit Court of Appeals, also noting the merit of petitioners' substantive claims, rejected petitioners' arguments, that the statute of limitations either did not apply or had been tolled, and affirmed. The court concluded that section 2401(a) barred petitioners' attack on the constitutionality of the 1972 Distribution Act.

According to the courts below, the statute of limitations began to run in 1972 when the Distribution Act was enacted. A

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<sup>2</sup> Previously, in granting a preliminary injunction, the district court noted that the Act directing distribution to "the individual lineal descendants [who] were not parties" to the settlement embodied in the final decree of the Indian Claims Commission, "may well constitute a deprivation of the 'property' rights of the Sioux Tribes, in violation of the proscription of the fifth amendment." Memorandum and Order, May 8, 1987, Sl.Op. at 4.

petition for rehearing was filed. It was denied on March 5, 1990.

The fund at issue remains in the Treasury. The United States has no ownership interest in this fund and claims none. It holds an interest in the fund akin to that of a stakeholder.

#### REASONS FOR GRANTING THE WRIT

##### I. THE CASE RAISES IMPORTANT QUESTIONS OF FEDERAL LAW.

- A. By applying a statute of limitations to an action seeking enforcement of a judgment, the court of appeals' decision permits congressional usurpation of powers constitutionally committed to the judicial branch.

Petitioners action essentially seeks to enforce a judicial judgment. The action is premised on the claim that, in violation of the Constitution and other federal law, the 1972 Distribution Act seizes petitioners' vested and exclusive property right in 25% of the funds awarded by judgment in 1967

and paid to petitioners in 1968.<sup>3</sup> The continuing jurisdiction of courts to protect and enforce judgments is an essential element of judicial power. Rights once vested by a judgment cannot be divested by the Congress. Chicago and Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113-114 (1948); McCullough v. Virginia, 172 U.S. 102, 123-124 (1898). By determining that Congress may terminate the ability of courts to enforce the judgments they render by enacting a statute of limitations applicable to judgment

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<sup>3</sup> The court of appeals states: "The Tribes are not correct in characterizing their suit as an action to enforce a judgment. If anything, it is an action to challenge a judgment." 895 F.2d at 592. The statement is unexplained and bizarre; it is also erroneous. The only judgment involved here made a monetary award in favor of the petitioner Tribes. The action seeks to enforce petitioners' vested right in 100% of this award.

enforcement actions, the court of appeals' decision establishes a principle in direct conflict with the power of the judicial branch under the Constitution to enforce judgments and the rights vested therein. Dugas v. American Surety Co., 300 U.S. 414, 428 (1937); Riggs v. Johnson City, 73 U.S. 166, 187 (1867). Under the separation of powers doctrine, this enlargement of congressional power is impermissible and, if permitted to stand, would have universal application to judgment enforcement actions. Accordingly, the court of appeals erred in concluding that 28 U.S.C. sec. 2401(a) applies to petitioners' action.

**B. Application of a statute of limitations to bar a judgment enforcement action is a denial of due process.**

Petitioners' Indian Claims Commission judgment had "the effect of a final judgment of the Court of Claims." 25 U.S.C. sec. 70u(a) (1976 ed.); United States v.

Dann, 470 U.S. 39, 45-47 (1985). The judgment was paid and petitioners acquired a vested right to the beneficial ownership of the judgment fund when the funds were deposited in the Treasury in trust for them. Id. at 44-45, 50. Once paid, these funds became tribal property; individual Indians had no vested rights in the funds. Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 85 (1977); Minnesota Chippewa Tribe v. United States, 161 Ct.Cl. 258, 270-271, 315 F.2d 906, 913-914 (1963). The 1972 Distribution Act confiscates 25% of the judgment fund and requires that it be paid to individuals who, in the absence of this Act, had no rights under the judgment or any claim or interest in the judgment fund.

A fundamental element of due process is the right of the prevailing party to obtain judicial enforcement of a judgment.

McCullough v. Virginia, supra, 172 U.S. at 123-124; Riggs v. Johnson City, supra, 73 U.S. at 187; Daylo v. Administrator of Verteran's Affairs, 501 F.2d 811, 816 (D.C. Cir. 1974). When an act of Congress, like section 2401(a), bars a prevailing party from suing to enforce compliance with a judgment, the act effectively strips the court of a function and power basic to due process and takes away rights vested by the judgment without due process of law.

C. Application of section 2401(a) to the Tribes' action conflicts with the purposes and intent of the Indian Claims Commission Act.

In an extraordinary act of national conscience, contrition, and apology, the Congress enacted the Indian Claims Commission Act ("ICCA"), 25 U.S.C. sec. 70 et seq. (1976 ed.). The ICCA established, as vital public policy, a goal of settling up for 19th century dishonorable dealings

with Indian tribes that resulted in divestiture of tribal lands. In urging passage, Congressman Henry Jackson, Chairman of the Committee on Indian Affairs, stated:

Let us pay our debts to the Indian tribes that sold us the land that we live on. Let us at least pay what we promised to pay, if we have not already done so, and let us see that Indians have their fair day in court so that they can call the various Government agencies to account on the obligations that the Federal Government assumed.

92 Cong.Rec. 5313 (May 20, 1946). Thus, the purpose of the ICCA was to provide tribes with "access to the courts for the enforcement of obligations the Federal Government freely assumed." H.Rep.No. 1466, 79th Cong., 1st Sess., 9 (1945). Since most of the Indian claims within the Indian Claims Commission's ("ICC") jurisdiction had accrued in the 19th century, elimination of statutes of limitation



applicable to such claims was an essential part of the ICCA. 25 U.S.C. sec. 70a (1976 ed.) (App. 50). Only in this way could the ICCA achieve its purpose of finally and equitably settling these ancient Indian claims. H.Rep.No. 1466, supra, at 10; 92 Cong.Rec. 5312-5320 (May 20, 1946); 92 Cong.Rec. 10403 (July 29, 1946).

Petitioners secured a judgment in their favor from the ICC some 120 years after the most recent of their claims first accrued. In 1968, the United States made payment of the sums awarded but retained these funds in the Treasury in trust for the petitioner Tribes. The 1972 Distribution Act directs the disbursement of 25% of these funds in a way that directly conflicts with the ICC judgment. The underlying purpose of the ICCA to guarantee Indians a fair day in court and to pay the adjudicated debts of the United States to the Indian tribes is

defeated if tribes can be barred by a statute of limitations from suing to prevent the trustee from paying the awarded funds to persons having no adjudicated right in the funds. Certainly, nothing in the ICCA or its legislative history suggests that statutes of limitation apply in such circumstances.

The ICCA imposes no period of limitation on suits by tribes to enforce their judgments or on tribes' suits to obtain judgment funds paid to their credit and held by the United States in trust for them. Applying the period of limitation in section 2401(a) to tribal suits to enforce ICC judgments contravenes the jurisdiction of the ICC to "hear and determine" tribal claims "notwithstanding any statute of limitations." 25 U.S.C. sec. 70a. It also defeats the ICCA's goal of finality because, as here, tribal claims will remain

unsettled until full satisfaction of the ICC judgment.

The court of appeals' decision applies a general statute of limitations to actions for the enforcement of rights arising out of the ICCA. The ICCA deliberately intended to settle ancient Indian claims without regard to any statute of limitations. The decision is wrong and should be corrected.

II. The court of appeals' decision that petitioners' right of action did not first accrue in 1987 conflicts with applicable decisions of this Court.

A. Petitioners' Fifth Amendment due process claim first accrued in 1987.

Petitioners claim, inter alia, that the 1972 Distribution Act violates the Fifth Amendment because all of the 25% set aside for individuals would be distributed either to persons who do not have a Sisseton and Wahpeton Sioux lineal ancestor or whose Sisseton and Wahpeton Sioux lineal

ancestors had terminated their tribal membership, splitting off from and severing their relations with the Tribe. Petitioners' complaint also alleges that the prospective individual distributees have no affiliation with petitioner tribes.

Petitioners maintain that Delaware Tribal Business Committee v. Weeks, supra, 430 U.S. at 84-87, established the principle that a distribution of ICC judgment funds to persons who have no affiliation with the judgment creditor tribe, is not "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." According to the court of appeals, Weeks did not reach this issue, but instead concluded that Congress may constitutionally deny such a distribution. 895 F.2d at 595.

Even assuming that the court of appeals' understanding of Weeks is correct,

petitioners have the right to bring suit on the issue not reached in Weeks by claiming, as they have, that a distribution of tribal funds to persons having no affiliation with petitioner tribes is arbitrary and violates the Fifth Amendment. This claim could not be asserted until 1987 when the identities of the prospective individual distributees first became known. Accordingly, petitioners' right of action with respect to this claim first accrued in 1987 and is not barred by section 2401(a).

**B. Petitioners' taking and breach of trust claims first accrued in 1987.**

Petitioners' claim that the United States has taken tribal property without just compensation could not be asserted until 1987. It was at that time that the Government confiscated tribal property and made a determination to transfer it to persons having no right or claim to it

under the Constitution or the 1972 Distribution Act. In order to make this claim, petitioners required knowledge of the identities of the individual distributees.

Similarly, petitioners' breach of trust claim could not be asserted until the identities of the individual distributees became known. Until that time, petitioners could not claim that the Government had breached its trust obligation to "distribute[] [ICC judgment funds] in a manner consistent with the best interests of the Tribe." United States v. Dann, supra, 470 U.S. at 49-50, 50 n. 13. It was only upon certification of a distributee roll and the determination to transfer tribal property to persons having no right to it under the Constitution or the 1972 Distribution Act that the United States, as trustee of the property, clearly acted to

distribute these tribal funds contrary to petitioners' best interests and benefit and, thereby, to repudiate its trust obligations to petitioners. For statute of limitations purposes, the period of limitation in section 2401(a) did not begin to run until this repudiation occurred in 1987. Lewis v. Hawkins, 90 U.S. 119, 126 (1874).<sup>4</sup>

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<sup>4</sup> Petitioners complaint includes the claims that the 1972 Distribution Act constituted a taking of petitioners' vested right in the funds at issue here and breached the trust obligations of the United States to them. In the alternative, petitioners claimed that the manner in which the Government has implemented the 1972 Distribution Act effected a taking of their property and breached the Government's trust responsibility to them. It is only these alternative claims that require knowledge of the identities of the prospective individual distributees and that are addressed in this petition.

C. Section 2401(a) does not run against an erroneous payment until the payment has been made.

Statutes of limitation do not run against an erroneous payment until the payment has been made. United States v. Wurts, 303 U.S. 414, 418 (1938). The 1972 Distribution Act did not effect payment to the individuals for whom the 25% was set aside. In 1972, the identities of prospective individual distributees were unknown. It was also unknown whether any individuals would qualify for payment. At least until 1987, therefore, the United States held the judgment funds at issue in trust for petitioners. No payment to the prospective individual distributees had



been made.<sup>5</sup> In fact, as recently as 1986, both the Department of the Interior and the Department of Justice informed the Congress that these individuals not only had not been paid but had no vested right in the 25% of the 1967 judgment fund set aside for distribution to individuals under the 1972 Distribution Act. S.Rep.No. 468, 99th Cong., 2d Sess., 5-7 (1986).

Payment to the individuals could occur only upon the Secretary of the Interior's certification of a distributee roll

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<sup>5</sup> The court of appeals apparently misunderstood petitioners' argument. 895 F.2d at 595. Petitioners do not raise any issue pertaining to when "payment" of an ICC judgment award to a tribe occurs. The erroneous payment challenged by petitioners is the tribal trustee's 1987 payment of tribal funds to persons ineligible and unqualified to receive such payment both under the Constitution and the 1972 Distribution Act.

pursuant to 25 C.F.R. sec. 61.14, or upon the distributee's actual receipt of funds from the Government.

Prior to payment to these individuals, the possibility remained that no roll would be certified or, at least, that payment would be made only to persons qualified to receive a share of the 25% in accordance with the requirements of the Fifth Amendment and the 1972 Distribution Act. For these reasons, at least until 1987, there had been no erroneous payment of the petitioners' funds to others. Accordingly, petitioners' action was commenced within the period of limitation prescribed in section 2401(a).

#### CONCLUSION

As with all tribes with similar experiences, the Sisseton and Wahpeton Sioux retain a lingering bitterness over

having been cheated out of their lands during the last century. This bitterness is now compounded by the further taking of a portion of the very funds intended, at long last, to compensate for that irreparable injury and loss. The funds at issue represent compensation for the taking of 6.75 million acres of tribal land (i.e., 25% of the 27 million acres involved in the 1967 ICC judgment).

This Court has frequently stated that tribal property rights are "as sacred as" the property rights of non-Indians. See e.g., Mitchel v. United States, 9 Pet. 711, 746 (1835). This lofty principle, too often honored in the breach, is tested in this case. No purpose of any statute of limitations is served when the imposition of the period of limitation has the effect of sanctioning the federal trustee's

confiscation and transfer of tribal property to persons having no legitimate right or claim to it. At the very least, justice requires that petitioners be permitted to litigate their claims. Under the circumstances here, application of section 2401(a) should be governed by the "...settled policy of the United states fairly to deal with Indian tribes...[by] seek[ing] no advantage for itself...." United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938).

For all of the foregoing reasons, this Court should issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

June 20, 1990

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## APPENDIX



UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SISSETON-WAHPETON SIOUX TRIBE,  
of the Lake Traverse Indian  
Reservation, North Dakota and  
South Dakota, DEVILS LAKE SIOUX  
TRIBE, of the Devils Lake Sioux  
Reservation, North Dakota;  
SISSETON-WAHPETON SIOUX  
COUNCIL, of the Assiniboine and  
Sioux Tribes of the Fort Peck  
Indian Reservation, Montana,  
*Plaintiffs-Appellants,*

v.

UNITED STATES OF AMERICA,  
DONALD P. HODEL, Secretary of the  
Interior; JAMES A. BAKER,  
Secretary of the Treasury,  
*Defendants-Appellees.*

No. 88-3922

D.C. No.

CV-87-95-GF-PGH

OPINION

Appeal from the United States District Court  
for the District of Montana  
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted  
November 1, 1989—Seattle, Washington

Filed February 2, 1990

Before: James R. Browning, Mary M. Schroeder and  
Betty B. Fletcher, Circuit Judges.

Opinion by Judge Fletcher

## OPINION

FLETCHER, Circuit Judge:

The Sisseton-Wahpeton Sioux Tribe, the Devils Lake Sioux Tribe, and the Sisseton-Wahpeton Sioux Council of the Assiniboiné and Sioux Tribes ("the Tribes") appeal from the district court's dismissal of their suit, which the court found was barred by the six year statute of limitations imposed by 28 U.S.C. § 2401(a) on all civil action against the United States. The Tribes brought suit in 1987 to challenge the 1972 law that established the system for distributing a judgment entered by the Indian Claims Commission in 1967. We affirm the district court's dismissal.

## FACTS

The underlying facts are not in dispute. In the 1860's, the United States government took 27 million acres of land in Iowa, Minnesota, and South Dakota from the Sisseton-Wahpeton Tribes and subsequently failed to satisfy the terms of the treaties. The Tribes brought claims against the federal government around 1950 under Section 2 of the Indian Claims Commission Act, 25 U.S.C. § 70.<sup>1</sup> The Tribes and the

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<sup>1</sup>Congress created the Indian Claims Commission in 1946 to provide Indian tribes a forum for pursuing a variety of claims against the federal government. The Commission's life was extended until 1978, at which time its unfinished work was transferred to the Court of Claims. The Commission's jurisdiction was restricted to claims brought by tribes, as opposed to individual Indians. The statute allowed tribes to bring any claim that accrued anytime before five years after the ICCA was enacted.

The Commission heard claims and submitted its reports to Congress. When a report determining that a claimant was entitled to recover was filed



government eventually reached a compromise settlement, which was filed with Congress, and thereby became final, in July 1967. *Sisseton and Wahpeton Bands or Tribes v. United States*, 18 Ind. Cl. Comm. 526-1 (1967). Following the usual procedure in these actions, in 1968 Congress appropriated the money to satisfy the settlement and deposited the money in a U.S. Treasury account.

In 1972, Congress enacted a plan for distributing the money. 25 U.S.C. §§ 1300d-3, 1300d-4. This plan apportioned the judgment fund according to "reservation residence and other residence shown on the 1909 McLaughlin annuity roll" and distributed approximately 22% of the fund to the Devils Lake Sioux, 43% to the Sisseton-Wahpeton Sioux, 10% to Assiniboine and Sioux Tribe, and 25% to "[a]ll other Sisseton and Wahpeton Sioux." These latter "lineal descendants" are persons who are not eligible for membership in any of the tribes, but who can trace their lineal ancestry to someone who was a tribal member. The bill authorized the Tribes to retain 30% of their award to be used for programs to benefit the Tribes' membership, with the remaining 70% to be distributed per capita to tribal members. The Tribes were directed

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with Congress, that report had the effect of a final judgment, and authorized the appropriation of money necessary to pay the judgment. The Secretary of Interior then would compose a plan for Congressional approval.

According to F. Cohen's 1982 treatise, *Handbook of Federal Indian Law*, "Congress and the affected tribe have the right to control the disposition and distribution of claim awards. Congress has the power to determine the members of the tribe entitled to receive proportionate shares of tribal lands or funds. This general power also includes the right to establish procedures to determine tribal membership for the distribution of damage claim awards if there is an appropriation satisfying the judgment and if per capita distribution of the judgment is intended by Congress. Although distribution schemes enacted or approved by Congress are subject to judicial review, a distribution plan generally will not be disturbed if it is rationally tied to the government's unique obligation to the tribe." *Id.* 573-574. See also *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 85 (1977).

to bring current their membership rolls. The Secretary of Interior was charged with preparing a roll of the lineal descendants of the Sisseton and Wahpeton Mississippi Sioux Tribes, and the money allocated to "all other Sisseton Wahpeton Sioux" was to be paid per capita to those persons appearing on the roll. The roll was completed in April 1987, and payment was scheduled for May 7, 1987.

In April, 1987, the Tribes sued to block payment to the lineal descendants and to require the United States to pay their share instead to the Tribes. The Complaint listed eight claims for relief, including various due process violations, unconstitutional taking, breach of contract, and breach of the 1968 Appropriation Act. The District Court for the District of Montana preliminarily enjoined the government from disbursing any funds. The Court noted that the complaint raised serious questions, but criticized as "inexcusable" the Tribes' lack of diligence in bringing the action. In its final order, the Court ruled that all of the Tribes' claims are time-barred by 28 U.S.C. § 2401(a), rejecting their argument that the statute of limitations either is inapplicable or was tolled. The court found that it was irrelevant whether the claims were phrased in terms of a breach of contract, a breach of trust responsibility, or a constitutional violation, since under any theory of a violation of the Tribes' rights, the cause of action stemmed from and accrued at the time the 1972 Distribution Act was passed. The district court made no determination of the merits.

#### JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction under 28 U.S.C. § 1291. The district court entered judgment on May 3, 1988, and the notice of appeal was filed on June 20, 1988. The appeal is timely under FRAP 4(a)(1), which provides that where the United States is a party, notice must be filed within 60 days after entry of the judgment.

We review *de novo* a district court's dismissal for lack of subject matter jurisdiction. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989); *Peter Starr Prod. Co. v. Twin Continental Films*, 783 F.2d 1440, 1442 (9th Cir. 1986). Whether the district court applied the correct statute of limitations also is a question of law, reviewed *de novo*. *Christensen v. United States*, 755 F.2d 705, 707 (9th Cir. 1985). However, where the issue of limitations requires determination of when a claim begins to accrue, the complaint should be dismissed only if the evidence is so clear that there is no genuine factual issue and the determination can be made as a matter of law. *In re Swine Flu Prod. Liab. Litig.*, 764 F.2d 637, 638 (9th Cir. 1985); *Lundy v. Union Carbide Corp.*, 695 F.2d 394, 397-98 (9th Cir. 1982); *Williams v. Borden, Inc.*, 637 F.2d 731, 738 (10th Cir. 1980).

## DISCUSSION

The Tribes' substantive claims appear to have some merit; they assert that at no time prior to or including the entry of the final judgment did the United States represent that nonmembers would have a right to any portion of the judgment funds, and that in approving the settlement, none of the tribes understood that lineal descendants would be sharing in the distribution of the judgment fund. However, the Tribes fail to explain why they waited fifteen years to challenge the government's clear and explicit decision to award part of the fund to nonmembers. Although the Tribes offer many arguments why 28 U.S.C. § 2401(a)'s six year statute of limitations either does not apply or was tolled, they all run up against the same obstacle: the 1972 Distribution Act explicitly made the allocations that the Tribes now allege violated their rights, and the effect and terms of the Act were hardly obscure. In fact, the Tribes participated in the creation of the distribution plan, and eventually endorsed the Act. Although their support apparently was a compromise in order to get a distribution plan passed and possibly would not foreclose the Tribes from later bringing suit to challenge the Act, the fact of their

participation does underscore the point that the Tribes from the very beginning had full knowledge of the Act they now challenge.

I. 28 U.S.C. § 2401(a) *Statute of Limitations.*

The general statute of limitations applicable to civil actions against the United States, 28 U.S.C. § 2401(a), provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." The Tribes do not argue that a different statute of limitations applies; they simply challenge the application of § 2401(a).

The doctrine of sovereign immunity precludes suit against the United States without the consent of Congress; the terms of its consent define the extent of the court's jurisdiction. The applicable statute of limitations is a term of consent. The plaintiff's failure to sue within the period of limitations is not simply a waivable defense; it deprives the court of jurisdiction to entertain the action. *United States v. Mottaz*, 476 U.S. 834, 841; *Block v. North Dakota*, 461 U.S. 273, 292 (1983); *Soriano v. United States*, 352 U.S. 270, 273 (1957).

Indian Tribes are not exempt from statutes of limitations governing actions against the United States. *Mottaz*, 476 U.S. at 842 (Quiet Title Act's statute of limitations applies to Indians as well as to other litigants); *Mann v. United States*, 399 F.2d 672, 673 (9th Cir. 1968)(§ 2401(b)'s two year statute of limitations in Federal Tort Claims Act applied to bar Navajo plaintiff's action); *Capoeman v. United States*, 440 F.2d 1002, 1008 (Ct. Cl., 1971)(Tucker Act's six year statute of limitations, 28 U.S.C. § 2501, applies to Indians). Further, 28 U.S.C. § 2401(a) applies to equitable claims as well as claims for monetary damages. *Christensen v. United States*, 755 F.2d 705, 708 (9th Cir. 1985)(appellants' equitable and legal claims against Bureau of Indian Affairs time-barred by § 2401(a)), *cert. denied*, 476 U.S. 1181 (1986).

[1] Because 28 U.S.C. § 2401 is a condition of the waiver of sovereign immunity, courts are reluctant to interpret the statute of limitations in a manner that extends the waiver beyond that which Congress clearly intended. *United States v. Kubrick*, 444 U.S. 111, 117-18(1979), *Soriano*, 352 U.S. at 276; see, e.g., *Block*, 461 U.S. at 287 (applying statute of limitations contained in Quiet Title Act to bar the state's suit; conditions on the waiver of sovereign immunity "must be strictly observed, and exceptions thereto are not to be lightly implied."). None of appellants' arguments overcome this burden.

## II. 28 U.S.C. § 2401 applies to actions to enforce Indian Claims Commission judgments.

[2] The Tribes begin by claiming that 28 U.S.C. § 2401 does not apply to actions on judgments in general because a court's jurisdiction to enforce a judgment continues until the judgment is satisfied. Appellants rely on *United States v. Taylor*, 104 U.S. 216 (1881), which held that where funds have been deposited to be held for the use of the owner, the statute of limitations runs from the time demand for payment is made at the Treasury. *Id.* at 222. The Tribes are not correct in characterizing their suit as an action to enforce a judgment. If anything, it is an action to challenge a judgment. It is entirely different from *Taylor*. In *Taylor*, the government had sold a property owner's land to collect taxes and placed the surplus proceeds in a Treasury account to be held for the owner until she applied for the money. The claimant demanded the money more than six years after it had been deposited. The Court understandably held the suit was not barred by the statute of limitations, analogizing from the rule applicable to trusts that the statute of limitations does not begin to run until the trustee "unequivocally repudiates" the trust, which in the context of a trust occurs when the trustee "claims to hold the estate as his own." The court reasoned that a cause of action does not accrue until the beneficiary has knowledge of the repudiation, which in this context would occur only

when the trustee refused to pay the money to the beneficiary, which presumably could occur only after the beneficiary has demanded the money. *Id.* The Tribes, in contrast, had immediate knowledge of the precise share of money Congress found them entitled to as well as Congress' intent to distribute the balance to others. Further, *Taylor* and the other "trust repudiation" cases involved uncontested claims, so that it could only be a refusal to pay that could constitute a "repudiation" of the trust.<sup>2</sup> Here, in contrast, the Tribes lost their right to the disputed funds once Congress passed the 1972 Distribution Act. The allocation of funds rather than a demand for payment to the Tribes was the triggering event that commenced the running of the statute of limitations.

[3] Second, the Tribes argue that § 2401(a) is inapplicable to Indian Claims Commission judgments because it is contrary to the intent of the Indian Claims Commission Act. The gist of the argument is that by allowing tribes to bring claims accruing any time up to five years after August 13, 1946, regardless of how early the cause of action accrued, Congress established that it "was not concerned about repose or that Indian claims may be stale." This stretches the Act beyond reason. As the Court interpreted it in *United States v. Dann*, 470 U.S. 39, 45 (1985), the Act had two purposes. The "chief purpose" of the Act was to "dispose of the Indian claims problem with finality," which was accomplished by giving the Commission's report filed with Congress the effect of a final judgment. The second purpose was to transfer from Congress to the Indian Claims Commission the responsibility for determining the merits of Native American claims. Even if we

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<sup>2</sup>See also *Capoeman v. United States*, 440 F.2d 1002 (Ct. Cl., 1971) (rejecting Indian plaintiff's reliance on *Taylor* to claim exemption from Tucker Act's six year period of limitations because government had been holding money adversely to Plaintiff Capoeman). Cf. *Jones v. United States*, 801 F.2d 1334, 1336 (Fed. Cir., 1986) (trustee may repudiate trust, so as to start statute of limitations running on claim for breach, either by words or by actions inconsistent with obligations under the trust) *cert. denied*, 481 U.S. 1013 (1987).



agree with the Tribes that Congress also intended to open wider the door to federal court especially for Indians to assert claims based on wrongs that occurred when their lands were taken, imposing no time limit on challenges to the distribution plans furthers none of these purposes.

The Tribes rely on *Red Fox v. Red Fox*, 564 F.2d 361 (9th Cir. 1977) as support for their claim that § 2401(a) is inapplicable to Indian Claims Commission claims. Although the case is not as irrelevant as the government suggests, we conclude that it lends little comfort to the Tribes. The *Red Fox* court held that the plaintiff's due process claims under the Indian Civil Rights Act were barred by the state court's judgment in a domestic relations case because the state court had fully and fairly litigated the claims. Our court noted, however, that "in view of the unique historical relationship between the American Indian and the federal government, we emphasize that a state court judgment on the merits may not invariably serve as the basis for the application of *res judicata* in a federal suit for alleged violation of the Indian Civil Rights Act." *Id.* at 365. Although we agree with the Tribes that the policy underlying *res judicata* has some congruence with the values promoted by statutes of limitations, we do not agree that this dicta in an Indian civil rights case can be extended to make inapplicable a statute of limitations. *See, e.g., Mottaz*, 476 U.S. at 851 ("Federal law rightly provides Indians with a range of special protections. But even for Indian plaintiffs, a waiver of sovereign immunity cannot be lightly implied but must be unequivocally expressed.") quoting *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

[4] The Tribes also argue that the specific time provisions contained in the Indian Claims Commission Act preempts the general § 2401(a) statute of limitations. We agree that when legislation contains its own statute of limitations, the more specific limitation preempts a more general statute of limitations. *See, e.g., Block*, 461 U.S. at 292 (twelve year statute of limitations contained in the Quiet Title Action statute

applied to bar the state's claim). Although there is a specific treatment of time limitations on claims filed under the Indian Claims Commission Act—the normal statutes of limitations explicitly were waived, and Tribes were permitted to assert claims within five years of the Act's enactment regardless of when they accrued—that limited waiver defined the scope of claims that could be asserted. The purpose of the Act was to provide final resolution for all tribal claims stemming from the period of United States colonization forward. It cannot be read, as the Tribes suggest, to waive a limitations period for any and all subsequent challenges to settlements or adjudications of those claims simply because “[t]he Act imposed no period of limitation on suits by tribes to enforce their judgments.” Brief for Appellants, at 28.

### III. *Appellants' right of action did not first accrue in 1987.*

The Tribes claim that because they did not know the identities of the lineal descendants or their total number until the Secretary of Interior approved the roll in 1987, the Tribes' cause of action did not accrue until that date. “[I]t was only at that time that the Tribes first learned that the persons identified on the roll were not Sisseton and Wahpeton Sioux lineal descendants.”<sup>3</sup> Brief for Appellants, at 30. Although a cause of action does not accrue until the claim is “perfected,” and statutes of limitations do not commence running until plaintiffs knew or should have known the facts upon which their claims are based, the mistakes and “new” information the Tribes point to, with one possible exception, simply are irrelevant to their challenge to the 1972 Distribution Act's award of money to lineal descendants.

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<sup>3</sup>It is unclear from the record whether the Tribes are claiming that the roll contains *no bona fide* Sisseton Wahpeton lineal descendants or that the roll is faulty because *some* nonqualified individuals were included. They appear to be pleading in the alternative, but this strategy has created a muddy and unpersuasive record.



If the Tribes are claiming that the list erroneously includes *some* individuals who are not lineal descendants, it is difficult to understand how that error could be the basis for challenging the 25% allocation to the lineal descendants as a group. The Tribes cannot claim the entire judgment fund on the basis that errors have been made in identifying some individuals as entitled to share in the 25%. As the government points out, the Tribes' proportion was determined conclusively in 1972; Congress determined at that time that 25% of the fund would *not* go to the Tribes.

The tribes also argue that their claims are based in part on the *number* of persons certified as "lineal descendants," a fact which they could not know until the roll was completed. They complain that the per capita award will be lower for tribal members than for non-members. This indeed may be unfair. However, only if the number of lineal descendants were exceptionally small might the Tribes claim that the distribution plan ultimately is irrational. This does not appear to be the claim they make. We do not, however, rule out the Tribes' amending the complaint to state facts supporting such a claim.

If the Tribes now are claiming that the roll contains *no* lineal descendants, this conceivably could be grounds for reallocating the 25% share to the Tribes, and knowledge of this deficiency would have been necessary to "perfect" the Tribes' cause of action. The basis of the Tribes' claim that none of the individuals on the roll are descendants of Sisseton-Wahpeton tribal members is obscure, however. At oral argument, the Tribes' attorney represented to the court that the Tribal elders possessed knowledge that would substantiate appellants' claim that no lineal descendants appeared on the 1987 roll. As it currently exists, the complaint is not sufficiently informative in regard to this issue to withstand a motion to dismiss. Appellants should be permitted, however, to amend their complaint to assert facts that

would form the basis of a claim that *no* lineal descendants appear on the 1987 roll.

In addition, the Tribes argue that the announcement of the composition of the roll in 1987 was critical to their cause of action: only then could the Tribes have known that the list violated the "constitutional eligibility criteria" first articulated in *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83 (1977). The Tribes misread *Weeks*. Although they are quite right that Congress is not at liberty to disburse Indian Claims Commission judgment funds to anyone it chooses, *Weeks* did not hold that Congress may not disburse funds to individuals who have maintained no affiliation with the Tribe. It simply upheld, as rationally related to fulfilling the "unique obligation toward the Indians," Congress's policy judgment not to do so.<sup>4</sup> *Id.* at 86. Because *Weeks* did not establish a new rule of law affecting the Tribes' ability to bring their cause of action, it cannot, as the Tribes assert, have tolled the statute of limitations.

[5] The Tribes also argue that their cause of action did not accrue until 1987 because only then did a designated portion of the fund become payable to the individual descendants, who for the first time obtained a vested right in the judgment. Again, this is irrelevant to the Tribes' claim. It might affect the time of accrual of the lineal descendants' cause of action, not the Tribes'. The Tribes also argue that statutes of limitations do not run against erroneous payments until payment is made. However, under *United States v. Dann*, 470 U.S. 39 (1985) "payment" of Indian Claims Commission judgments

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<sup>4</sup>The Tribes also point to *Weeks* as providing them with the first notice that all lineal descendants are not necessarily entitled under the Constitution to share in a tribe's Indian Claims Commission judgment fund. This more accurately reports the decision, but this asserted consequence simply does not square with the Tribes' alternative claim that their equal protection rights were violated because no other tribes had been required to share their judgments with lineal descendants.

occurs when Congress appropriates the money and deposits it into the Treasury. *Id.* at 50.

#### IV. *The statute of limitations has not been tolled.*

The Tribes argue that even if their claim accrued in 1972, the statute of limitations has been tolled because of the various changes in the governing caselaw after 1972, which, according to Appellants, first gave them a "reasonable probability of successfully prosecuting" their claim against the government. *United States v. One 1961 Red Chevrolet Impala*, 457 F.2d 1353, 1358 (5th Cir. 1972) (the period of limitations does not always begin on the date of the wrong; no cause of action generally accrues until the plaintiff has a right to enforce his cause). The government responds that the Tribes *had* a reasonable probability of success from the time the cause of action accrued in 1972, and that a statute of limitations "is not tolled by litigative timidity." *Welcker v. United States*, 752 F.2d 1577, 1583 (Fed. Cir.), *cert. denied*, 474 U.S. 826 (1985). The District Court did not address the Tribes' tolling argument.

The Tribes' first tolling claim is that from 1976 until 1983 the applicable case law led them to believe that the federal government's sovereign immunity was not waived by the Tucker Act, and, therefore, the Tribes' Tucker Act claims were tolled.<sup>5</sup> This position is unpersuasive since none of the Tribes' claims are Tucker Act claims.

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<sup>5</sup>The Tucker Act generally has been understood as being a grant of jurisdiction and a waiver of sovereign immunity that does not itself create any substantive rights. Plaintiffs suing under the Tucker Act, therefore, must establish that the source of substantive law upon which they rely mandates compensation by the Federal Government for the damage sustained.

The issue to which the Tribes refer is whether the Tucker Act was itself a waiver of sovereign immunity. The Supreme Court in *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*), explicitly cleared up any confusion it may have generated in two earlier decisions, *United States v. Testan*, 424 U.S. 392 (1976) and *United States v. Mitchell*, 445 U.S. 535 (1980); the Court in *Mitchell II*, 463 U.S. at 212, stated that the Act constitutes a waiver of sovereign immunity with respect to the claims over which it granted the Court of Claims jurisdiction.

Not every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act. The claim must be one for money damages against the United States, and the claimant must demonstrate that the source of substantive law he relies upon "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained."

*United States v. Mitchell*, 463 U.S. 206, 216-217 (1983) (citations omitted). The Tribes' complaint seeks injunctive and declaratory relief; the Tucker Act is limited to claims for money damages and gives no jurisdiction to hear claims for equitable relief.<sup>6</sup> While the Tribes' goal is to secure money for themselves, it is not sought in the form of damages against the government.

Our cases have long recognized the distinction between an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which may include an order providing for . . . "the recovery of specific property or monies . . . ."

*Bowen v. Massachusetts*, 108 S.Ct. 2722, 2731-32 (1988), quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949).<sup>7</sup>

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<sup>6</sup> See P.M. Bator, P.J. Mishkin, D.J. Meltzer, D.L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 1146 (1988); 17 C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure*, § 4101, at 348-355 (1988).

<sup>7</sup> See also Judge Bork's full discussion on the difference between money damages and other monetary relief reprinted in *Bowen v. Massachusetts*, 108 S.Ct. 2722, 2732 (1988) ("The term 'money damages' normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.' " quoting D. Dobbs, *Handbook of the Law of Remedies* 135 (1973)). 709 F.2d at 573.

Second, the Tribes assert that they could not have brought their breach of contract claim until 1983, because it was not until the court held in *Angle v. United States*, 709 F.2d 570, 573 (9th Cir. 1983) that a settlement embodied in a final decree of the Indian Claims Commission is a contract within the meaning of the Tucker Act that the Tribes knew they had an enforceable contract claim. The government responds that *Angle* merely recharacterized the nature of the cause of action stemming from the injury allegedly suffered, and that this does not mean that the injury was not known or knowable. Perhaps a simpler response is that this portion of the *Angle* opinion merely reiterated that settlement agreements are enforceable under the Tucker Act, citing to *United States v. McInnes*, 556 F.2d 436, 441 (9th Cir. 1977).<sup>8</sup>

The Tribes' argument that their violation of due process, the just compensation clause of the fifth amendment, and the 1968 Appropriations Act claims could not have been asserted until the Supreme Court's decision in *United States v. Dann*, 470 U.S. 39 (1985) is puzzling. *Dann* held that "payment" of an Indian Claims Commission judgment occurs when Congress appropriates and deposits the money into the Treasury. *Id.* at 50. This overturned the Ninth Circuit's ruling that payment does not occur until Congress adopts a plan for distribution. To the extent the law on this issue was unsettled, it could in no way have tolled the statute of limitations, because in this case, the effect of *Dann* was to establish 1968 rather than 1972 as the relevant date.

The Tribes also argue that their claims assert continuing wrongs, and that a claim to redress such violations will be deemed to have accrued on the date of the last wrongful act. While they correctly state the law of continuing violations, see, e.g., *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1190 (9th

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<sup>8</sup>The thrust of the contract analysis in *Angle* was simply that the excluded individual Indian plaintiffs were not parties to the contract because they were not parties to the settlement agreement.

Cir. 1984) (tying arrangement could be a continuing violation of Sherman Act, which would toll the statute of limitations), the alleged wrongful acts of the government simply do not constitute a "continuing wrong" for statute of limitations purposes. According to the Tribes, the certification of an improper roll in 1987 was just another in a series of bad acts done by the government against the Tribes. This may be. "Continuing wrongs," however, are repeated instances or continuing acts of the same nature, as for instance, repeated acts of sexual harassment or repeated discriminatory employment practices. In the present case, the alleged wrong is not of such a nature.

Finally, the Tribes argue that the statute of limitations should be tolled to avoid injustice. Although tolling can be based on equitable reasons, precedent is scant and the situations are unlike the Tribes' (see e.g., *Hohri v. United States*, 782 F.2d 227, 247 (D.C. Cir. 1986), *rev'd on other grounds* 482 U.S. 64 (1987) (government's fraudulent concealment of reports which concluded there was no military necessity for interning the Japanese tolled the statute of limitations). The United States certainly owes a special obligation, but it is to the Indian people. *United States v. Mitchell*, 463 U.S. 206, 225 (1982). Here, where the claim essentially pits one group of Indians against another, and the government's actions were clearly visible, there is no basis for such tolling.

## CONCLUSION

We affirm the district court's dismissal of Appellants' suit as barred by the 28 U.S.C. § 2401(a) statute of limitations, subject to the possibility of amending the complaint consistent with this opinion.



App. 17

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
GREAT FALLS DIVISION

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SISSETON-WAHPETON )  
SIOUX TRIBE of the Lake  
Traverse Indian Reser-) No. CV-87-095-GF  
vation, North Dakota )  
and South Dakota, )  
DEVILS LAKE SIOUX TRIBE  
of the Devils Lake )  
Sioux Indian Reserva-  
tion, North Dakota, )  
and the SISSETON-  
WAHPETON SIOUX COUNCIL)  
of the Assiniboine and  
Sioux Tribes of the )  
Fort Peck Indian  
Reservation, Montana, )

Plaintiffs,)

vs. )

UNITED STATES OF )  
AMERICA and DONALD F.  
HODEL, Secretary of the )  
Interior, JAMES A. ) MEMORANDUM DECISION  
BAKER, Secretary of )  
the Treasury, )

Defendants.)

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The present action challenges the validity of an act of Congress implemented to distribute those sums of money appropriated by Congress to satisfy a final judgment entered by the Indian Claims Commission pursuant to the authority vested in that entity by the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. sec. 70. At issue is the Act of October 25, 1972 (25 U.S.C. secs. 1300d, et. seq.), which provided for distribution of a congressionally appropriated fund of money to the Sisseton and Wahpeton Tribes of Sioux Indians in satisfaction of a compromise judgment entered by the Indian Claims Commission to redress a breach by the United States of the terms of the Treaty of Prairie du Chien of July 15, 1830, and the Treaty of Traverse des Sioux of July 23, 1851. The Devils Lake Sioux Tribe of North Dakota,



the Sisseton and Wahpeton Sioux Tribe of South Dakota and the Sisseton and Wahpeton Council of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana (hereinafter collectively referred to as the "plaintiff Tribes"), challenge the validity of that portion of the Distribution Act which provides for distribution of part of the fund to the individual lineal descendants of the Sisseton and Wahpeton Mississippi Sioux Tribe who are not members of any of the plaintiff Tribes (hereinafter referred to as "lineal descendants").

The plaintiff Tribes contend a distribution to lineal descendants of any monies appropriated to the Sisseton and Wahpeton Tribes of Sioux Indians pursuant to the final judgment of the Indian Claims Commission entered on July 25, 1967, in the Sisseton and Wahpeton Bands or Tribes,

et al. v. United States of America, 18 Indian Claims Commission 526-a (1967), would violate: (1) the rights guaranteed the plaintiff Tribes under the due process and just compensation clauses of the fifth amendment to the United States Constitution; (2) the Tribes' rights established by agreement with the United States that settled the Tribes' action before the Indian Claims Commission; (3) the Supplemental Appropriations Act of June 19, 1968, which appropriated funds to satisfy the judgment entered by the Indian Claims Commission; (4) the trust responsibility and duty of the United States to the plaintiff Tribes.

The plaintiff Tribes invoke jurisdiction under 28 U.S.C. secs. 1331, 1346(a)(2), 1361, 1362 and the fifth amendment to the United States Constitution.

On May 8, 1987, this Court granted the Sioux Tribes' request for preliminary injunctive relief thereby enjoining the distribution of the fund to the lineal descendants in accordance with the directive of 25 U.S.C. sec. 1300d-3(b), which was scheduled to commence on May 7, 1987.

The action is presently before the court on motion of the United States requesting the court to dismiss the plaintiff Tribes' claims on the grounds those claims are (1) barred by the general statute of limitations applicable to civil actions against the United States as established in 28 U.S.C. sec. 2401(a) and (2) the Distribution Act challenged by the plaintiff Tribes represents a legitimate, constitutionally permissible, exercise of the plenary authority of Congress over Indian money and property. The individual

defendants, i.e., Donald P. Hodel, Secretary of the Department of Interior, and James A. Baker, Secretary of the Department of Treasury, move the court to dismiss the complaint as against them upon the ground that it fails to state a claim against them upon which relief can be granted.

I.

Section 2 of the Indian Claims Commission Act, as amended, 25 U.S.C. sec. 70a, authorized claims to be brought on behalf of any Indian tribe, band or other identifiable group of American Indians for "claims arising from the taking by the United States,...of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant." Following the enactment of the Indian Claims Commission Act, the plaintiff Tribes, in two

companion actions, brought claim against the United States seeking compensation for approximately two million acres of land ceded by the Sisseton and Wahpeton Sioux Tribes to the United States by the Treaty of Prairie du Chien (sic) of July 15, 1830 (7 Stat. 328) and approximately 25 million acres of land ceded by the Sisseton and Wahpeton Sioux Tribes to the United States by the Treaty of Traverse des Sioux of July 23, 1851 (10 Stat. 949). On May 17, 1967, the plaintiff Tribes and the United States entered into a stipulation for settlement and entry of final judgment in the two actions before the Indian Claims Commission.

Based upon the stipulation executed between the parties, the Indian Claims Commission entered a final judgment on July 25, 1967, in favor of the Sisseton and Wahpeton Tribes of Sioux Indians in

the two companion actions, for the sum of approximately six million dollars. See, Sisseton and Wahpeton Bands or Tribes, et al. v. United States of America, 18 Indian Claims Commission 526-a (1967). The plaintiff Tribes and their respective members, under the supervision of the Bureau of Indian Affairs of the Department of Interior, voted to approve that settlement.

Pursuant to the Act of June 19, 1968 (82 Stat. 239), Congress appropriated money to satisfy the judgment entered by the Indian Claims Commission.<sup>1</sup> The monies

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<sup>1</sup>. Damage claim judgments awarded by the Indian Claims Commission are not self-executing, the Congress must appropriate funds to satisfy the judgment as well as implement a plan of distribution of the funds. Congress has the right to control the disposition and distribution of claims awarded. This power derives from the power vested in Congress to determine the members of the tribe entitled to receive proportionate shares of tribal lands or funds. See, United States v. Jim, 409 U.S. 80, 82-83 (1972); Cherokee Nation v. Hitchcock, 187 U.S. 294, 306-07 (1902).

appropriated were deposited in an interest-bearing trust account in the Treasury of the United States. Subsequently, by the Act of October 25, 1972 (25 U.S.C. secs. 1300d, et. seq.), Congress implemented a plan for the distribution of the fund. The Distribution Act provided, inter alia, that a portion

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This general power includes the right to establish procedures to determine tribal membership for the distribution of damage claim awards where an appropriation has been made in satisfaction of the judgment and if per capita distribution of the judgment is intended by Congress. See, Delaware Tribal Business Commission (sic) v. Weeks, 430 U.S. 73, 84-86 (1977); Wallace v. Adams, 204 U.S. 415 (1907). Distribution schemes implemented by Congress are subject to judicial review.

of the fund, specifically 25.0225% thereof, was to be set aside for distribution to Sisseton and Wahpeton Mississippi Sioux Tribe lineal descendants, i.e., persons who are not eligible for membership in any of the plaintiff tribes, but who can trace their lineal ancestry to someone who once was a tribal member. 25 U.S.C. secs. 1300d-3(b), 1300d-4(a). The Distribution Act further directed the Secretary of the Interior to prepare a lineal descendanty roll and to distribute, on a per capita basis, the funds allocated to lineal descendants whose names wee included on the roll. 25 U.S.C. secs. 1300d-3(b), 1300d-4(c).

The plaintiff Tribes challenged the validity of that portion of the Distribution Act which directs the distribution of a part of the judgment fund to the lineal descendants of the



Sisseton and Wahpeton Mississippi Sioux Tribe. The essence of the Tribes' position lies in their assertion that where there exists an Indian tribe that represents the interests of the aboriginal tribe which owned the lands, the taking of which by the United States necessitated the entry of a judgment for monetary compensation by the Indian Claims Commission, only those tribes and their members are constitutionally or legally entitled to share in an award of the Indian Claims Commission providing compensation for the wrong done to the aboriginal tribe. The Tribes' submit any act of Congress implemented to effectuate the distribution of a fund created to satisfy a judgment of the Indian Claims Commission must comport with the strictures of the fifth amendment to the United States Constitution. In that regard, the Tribes submit the fifth

amendment is violated if the Distribution Act cannot be tied rationally to the fulfillment of Congress' unique obligation toward Indians. Specifically, the Tribes assert that a judgment fund distribution law violates the fifth amendment when it authorizes distribution of the fund to persons whose lineal ancestors had severed their relations with the Tribes or to persons who themselves are not members of, or closely affiliated with, the Tribes holding a beneficial interest in the judgment fund. With respect to the judgment fund at issue in this action, the Tribes contend that the "lineal descendants" certified by the defendants as entitled to share in the distribution of the judgment fund are (1) persons who do not have a Sisseton and Wahpeton Sioux lineal ancestor; (2) persons who have a Sisseton and Wahpeton Sioux lineal

ancestor who severed relations with the Sisseton and Wahpeton Sioux Tribes; and (3) persons who are not members of, and have no close affiliation with, any of the plaintiff Tribes.

Having considered the arguments advanced by the parties in light of the record, the court is convinced the plaintiff Tribes' claims are time barred.

## II.

The United States contends the plaintiff Tribes' claims are barred by 28 U.S.C. sec. 2401(a), the general statute of limitations applicable to civil actions against the United States. Section 2401(a) provides, in pertinent part, that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." Regardless of whether the claims of the

plaintiff Tribes are founded in contract, or in tort, their claims necessarily accrued, the United States submits, on October 25, 1972, the date the Distribution Act at issue was passed by Congress. In view of the fact the present complaint was not filed until April 27, 1987, the United States asserts the plaintiff Tribes are precluded by the period of limitations set forth in 28 U.S.C. sec. 2401(a) from prosecuting their claims.

The plaintiff Tribes take the position that 28 U.S.C. sec. 2401(a) is simply inapplicable to the claims they assert. In the alternative, the plaintiff Tribes submit that if sec. 2401(a) is deemed to be the applicable statute of limitations, the statute has been effectively tolled under the circumstances of this case. The court disagrees.

When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction. United States v. Mottaz, 476 U.S. 834, 841 (1986) (citing, United States v. Sherwood, 312 U.S. 584, 586 (1941)). In particular, when the legislation at issue contains the statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity. Id. (citing, Block v. North Dakota, 461 U.S. 273, 287 (1983)). Consequently, a period of limitations placed upon the sovereign's waiver of immunity from suit is not a mere statute of limitation, but a condition precedent to the right to sue. Bartlesville Zinc Co. v. Mellon, 56 F.2d 154, 155 (7th Cir. 1932), cert. denied, 287 U.S. 602 (1932). The failure to comply with the period of limitations prescribed by 28 U.S.C. sec.

2401 does not merely provide the United States with a waivable defense to an action, but it serves to deprive the federal courts of jurisdiction to entertain the action. See, United States v. One 1961 Red Chevrolet Impala Sedan, 457 F.2d 1353, 1357 (5th Cir. 1972).

By its express terms, 28 U.S.C. sec. 2401(a) applies to every "civil action" commenced against the United States. The term "civil action" is viewed as a term of art, judicially and statutorily defined as an action commenced by filing complaint with a court of competent jurisdiction. See, Fed.R.Civ.P. 3; Crown Coat Front Company v. United States, 386 U.S. 503 (1967); Oppenheim v. Campbell, 571 F.2d 660 (D.C. Cir. 1978). Use of the phrase "every civil action" has been construed to indicate an intent on the part of Congress that section 2401(a) applies to both legal

and equitable actions. Geyen v. Marsh, 775 F.2d 1303, 1307 (5th Cir. 1985). In view of the express language utilized by Congress in its enactment of section 2401(a), the court is not persuaded by the plaintiff Tribes' general assertion of that statute's impertinence to the claims advanced against the United States by the present complaint.

The plaintiff Tribes seek to impress upon the court that application of the period of limitations established by section 2401(a) to their claims would contravene the policies and purposes of that statute, as well as the Indian Claims Commission Act. Placing particular emphasis upon the fact that the issues presented by this controversy are primarily legal in nature, the plaintiff Tribes seek to convince the court that the design of statutes of limitations in

seeking to preclude the prosecution of stale claims, is not fostered by application of the limitations period of section 2401(a) to the circumstances of this case. Moreover, the plaintiff Tribes implore the court to recognize that strict application of the period of limitations provided by section 2401(a) should yield to the contravailing and compelling federal policy embodied in the Indian Claims Commission Act to guarantee that Indian tribes finally receive payment of claims reduced to judgment by the Indian Claims Commission. The exacting fiduciary standard under which the actions of the United States toward Indian tribes must be scrutinized, the plaintiff Tribes submit, dictate that the United States be precluded from relying upon the limitations period of section 2401(a) to defeat the plaintiff Tribes' claims.



The court begins its analysis of the proposition advanced by the plaintiff Tribes cognizant of the caution expressed by the court of appeals for this circuit in Mann v. United States, 399 F.2d 672 (9th Cir. 1968):

Although exceptions to the applicability of the limitations period might occasionally be desirable, we are not free to enlarge the consent to be sued which the government, through Congress, has undertaken so carefully to limit. See, United States v. Sherwood, 312 U.S. 584, 586 (1941). The limitations period established by Congress 'must be strictly observed and exceptions thereto are not to be implied.' Soriano v. United States, 352 U.S. 270, 276 (1957).

Id. at 673. In Mann, the court rejected the plaintiff's reliance upon his status as an Indian, and hence the government's concomitant duty to the plaintiff as a ward of the government, to defeat application of the statute of limitations applicable to actions under the Federal

Tort Claims Act, i.e., 28 U.S.C. 2401(b). Id. at 673. The court reiterated that a general statute in terms applying to all persons include Indians and their property interests. Id. at 673 (citing, FPC v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960)).

The court finds nothing inherent in the fiduciary relationship extant between the United States and the various Indian tribes, or individual Indian persons, which precludes the United States from asserting the period of limitations provided in section 2401(a) as a bar to the prosecution of claims against that entity by an Indian tribe or an individual Indian person.<sup>2</sup>

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<sup>2</sup>. The court notes the period of limitations provided by 28 U.S.C. sec. 2401(a) has been applied in a variety of contexts involving suits by individual Indian persons or tribe against the United States. See, e.g., Big Spring v. United States, Bureau of Indian Affairs, 767 F.2d 614 (9th Cir. 1985) (section 2401(a)

In determining whether the United States may legitimately rely upon the limitations period established by section 2401(a) to preclude the plaintiff Tribes' prosecution of the claims sub judice, the court is guided by the observations of the United States Supreme Court in the case of United States v. Kubrick, 444 U.S. 111 (1979), regarding application of the period of limitations set forth in 28 U.S.C. sec. 2401(b) and applicable to claims founded upon the Federal Tort Claims Act. Having reiterated the point that statutes of limitation are designed

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applied to claims under provisions of the General Allotment Act (25 U.S.C. secs. 331-358)); Loring v. United States, 610 F.2d 649 (9th Cir. 1979) (section 2401(a) applied to claim by members of Indian community that the United States allegedly took right-of-way over their lands without compensation); Nichols v. Rysavy, 809 F.2d 1317 (8th Cir. 1987) (section 2401(a) applied to bar claim under 25 U.S.C. sec. 345); see also, Christensen v. United States, 755 F.2d 705 (9th Cir. 1985).

to protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, the court in Kubrick stated:

Section 2401(b), the limitations provision involved here, is the balance struck by Congress in the context of tort claims against the government; and we are not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims. Campbell v. Haverhill, 155 U.S. 610, 617 (1895); Bell v. Morrison, 1 Pet. 351, 360 (1828). We should regard the plea of limitations as a "meritorious defense, in itself serving the public interest." Guarantee Trust Company v. United States, 304 U.S. 126, 136 (1938).

We should also have in mind that the Act waives the immunity of the United States and that in construing the statute of limitations, which is a condition of that waiver, we should not take it upon ourselves to extend the waiver beyond that which Congress intended. See, Soriano v. United States, 352 U.S. 270, 276 (1957); cf., Indian Towing Company v. United States, 350 U.S. 61, 68-69 (1955). Neither, however, should we assume the authority to narrow the waiver that Congress intended. Indian Towing Company v. United States, supra.

The gravamen of the plaintiff Tribes' amended complaint is that the Distribution Act of October 25, 1972, serves to improperly deprive those tribal entities of their property in violation of both their constitutional rights, as well as the terms of the "contract" extant between the plaintiff Tribes and the United States, as embodied in the settlement agreement entered by those parties before the Indian Claims Commission. In that regard, the court recognizes that an Act of Congress appropriating funds, in satisfaction of a judgment of the Indian Claims Commission, creates a fund held in trust for the "tribes, band or groups" in whose favor the judgment of the Indian Claims Commission was entered. Angle v. United States, 709 F.2d 570, 575 (9th Cir. 1983). Accordingly, pursuant to the 1968 Appropriations Act, the judgment fund at

issue (sic) in the case at bar was held in trust for the plaintiff Tribes. Therefore, the plaintiff Tribes had a substantive right in that fund, and the sovereign immunity of the United States was waived with respect to damage claims predicated on a breach of the trust relationship. Angle v. United States, 709 F.2d at 574 (citing, Rogers v. United States, 697 F.2d 886, 890 (9th Cir. 1983), and Moose v. United States, 674 F.2d 1277, 1281 (9th Cir. 1982)).

It was the 1972 Distribution Act, which first provided, in section 202(a) and (c), 25 U.S.C. secs. 1300d-4(a) and (c), for a per capita distribution to individual Indians. Accordingly, on October 25, 1972, the date the Distribution Act was enacted, a designated portion of the judgment fund became, for the first time, a fund held for the

benefit of, and payable to, the individual lineal descendants. See, Angle v. United States, 709 F.2d at 574 (9th Cir. 1983). Recognition of the fact the plaintiff Tribes, as entities, became trust beneficiaries pursuant to the 1968 Appropriations Act, and that the individual lineal descendants of "all other Sisseton and Wahpeton Sioux" became trust beneficiaries of a portion of the judgment fund pursuant to the 1972 Distribution Act, places the issue of when any claim accrued to the plaintiff Tribes in proper perspective.

As a general rule, a cause of action accrues when the right to resort to federal court is perfected. Impro Products Inc. v. Block, 722 F.2d 845, 850 (D.C. Cir. 1983) (citing, Oppenheim v. Campbell, 571 F.2d 660 (D.C. Cir. 1978)). Restated, an action accrues upon discovery of the

alleged injury. Nichols v. Hughes, 721 F.2d 657 (9th Cir. 1983). Under the circumstances of the present case, any claim emanating from the decision of Congress to distribute a portion of the judgment fund appropriated by the 1968 Appropriations Act to individual lineal descendants accrued on October 25, 1972, the date the Distribution Act was enacted by Congress. The court finds it irrelevant whether the claim is phrased in terms of a breach of contract, a breach of trust responsibility, or a deprivation of constitutional right. Assuming the validity of each of the theories of liability advanced by the plaintiff Tribes, any cause of action having its genesis in the 1972 Distribution Act must be viewed as having accrued on the date Congress made its pronouncement. At that point in time plaintiffs' right to resort



to federal court was perfected.

The court is unpersuaded by the plaintiff Tribes' argument to the effect a cause of action did not accrue until the "roll" of lineal descendants was approved and certified by the Secretary of the Interior in 1987. It was not until that point in time, the plaintiff Tribes submit, that it became known whether any person would be determined eligible for inclusion on such a roll. Moreover, the plaintiff Tribes assert, a cause of action did not accrue regarding distribution of the judgment fund until the United States acted to disperse those funds to persons other than members of the plaintiff Tribes.

Upon entry of judgment by the Indian Claims Commission, the United States was placed in a dual role with respect to the plaintiff Tribes: the Government was at

once a judgment debtor, owing the amount set forth in the judgment to the Tribes, and a trustee for the plaintiff Tribes responsible for insuring that the money was put to productive use and ultimately distributed in a manner consistent with the best interests of the plaintiff Tribes. See, United States v. Dann, 470 U.S. 39, 49 (1985) (construing the "payment" requirement of section 22(a) of the Indian Claims Commission Act, 25 U.S.C. sec. 70(u)(a) (sic)). Upon payment of the judgment fund into the trust account, the United States, as fiduciary, was obligated to make the fund productive, and was fully accountable for any conversion or mismanagement of those funds. Id. at 50, n. 13. If, as the plaintiff Tribes contend, the distribution of a portion of the judgment fund to the lineal descendants is a violation of the

trust responsibility of the United States, the enactment of the 1972 Distribution Act must be viewed as constituting a distinct denial or repudiation of the trust relationship between the United States and the plaintiff Tribes.

Where the United States holds property in trust for another, the statute of limitations does not run against a beneficiary until the trust is terminated or repudiated, at least in cases involving liquidated claims. Capoeman v. United States, 440 F.2d 1002 (Ct.Cl. 1971) (applying the general statute of limitations applicable to claims of which the United States Claims Court has jurisdiction, 28 U.S.C. sec. 2501). Accordingly, the period of limitations applicable to the claims asserted by the plaintiff Tribes in the matter sub judice, i.e., 28 U.S.C. sec. 2401(a), began to run

against those entities, as the beneficiaries of the judgment fund, on October 25, 1972. Because the plaintiff Tribes did not institute the present action until April 27, 1987, their claims are clearly barred, having accrued more than six years prior to bringing the present suit.<sup>3</sup>

In view of the court's conclusion that

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<sup>3</sup>. As noted, the plaintiff Tribes name two federal officials as defendants. The complaint, as amended, however, fails to state any independent claim against those individual defendants. Rather, the complaint obviously pleads an ultra vires theory of liability against these individual defendants. In view of the Act of October 21, 1976, Pub.L. No. 94-574, sec. 1, 90 Stat. 2721 (5 U.S.C. sec. 702), which waives sovereign immunity for suits seeking non-monetary relief through non-statutory review of agency action, the ultra vires theory may not be relied upon to defeat application of the period of limitations established by section 2401(a). See, Geyen v. Marsh, supra, 775 F.2d at 1307. The plaintiff Tribes' action challenging the Distribution Act is an action against the United States subject to the period of limitations established by section 2401(a).

the claims of the plaintiff Tribes' (sic) are barred by the statute of limitations established in 28 U.S.C. sec. 2401(a), the court finds it unnecessary to pass on the merits of the plaintiff Tribes' claims. Therefore, based upon the reason and authority set forth herein.

IT IS HEREBY ORDERED that the motion to dismiss of the defendant United States of America be, and the same hereby is, GRANTED.

The Clerk is directed to enter judgment accordingly.

DATED this 2 day of May, 1988.

s/Paul G. Hatfield  
PAUL G. HATFIELD  
UNITED STATES DISTRICT JUDGE

App. 48

SUPREME COURT OF THE UNITED STATES

No. A-797

Sisseton-Wahpeton Sioux Tribe, et al.,

Petitioners

v.

United States, et al.

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O R D E R

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UPON CONSIDERATION of the application  
of counsel for the petitioner,

IT IS ORDERED that the time for filing  
a petition for a writ of certiorari in the  
above-entitled case, be and the same is  
hereby, extended to and including

June 20th \_\_\_\_\_, 1990.

/s/ Sandra Day O'Connor  
Associate Justice of the Supreme  
Court of the United States

Dated this 14th  
day of May, 1990.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SISSETON-WAHPETON	)	
SIOUX TRIBE, of the	)	
Lake Traverse In-	)	
dian Reservation,	)	F I L E D
North Dakota and	)	
South Dakota,	)	March 5 1990
DEVILS LAKE SIOUX	)	
TRIBE, of the	)	CATHY A. CATTERSON,
Devils Lake Sioux	)	CLERK
Reservation, North	)	
Dakota; SISSETON-	)	U.S. COURT OF
WAHPETON SIOUX	)	APPEALS
COUNCIL, of the	)	
Assiniboine and	)	
Sioux Tribes of the	)	
Fort Peck Indian	)	No. 88-3922
Reservation,	)	
Montana,	)	D.C. No.
	)	CV-87-95-GF-PGH
Plaintiffs-Appellants,	)	
	)	
v.	)	
	)	
UNITED STATES OF	)	
AMERICA, DONALD P.	)	
HODEL, Secretary of	)	
the Interior; JAMES A.	)	
BAKER, Secretary of	)	
the Treasury,	)	ORDER
	)	
Defendants-Appellees.	)	
	)	

Before: BROWNING, SCHROEDER and FLECTCHER,  
Circuit Judges.

Appellants' petition for rehearing is  
denied.

**Constitutional provisions and statutes involved:**

1. Due Process Clause, Fifth Amendment, United States Constitution.

No person shall...be deprived of life, liberty, or property, without due process of law....

2. 25 U.S.C. sec. 70a, para. 2 (1976 ed.).

All claims hereunder may be made and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

3. Mississippi Sioux Tribes Distribution of Judgment Funds Act of October 25, 1972, 25 U.S.C. sec. 1300d et seq. (selected provisions).

Section 1300d. The funds appropriated by the Act of June 19, 1968 (82 Stat. 239), to pay compromise judgments to the Mdewakanton and Wahpakoota Tribe of Sioux Indians, and the Sisseton and Wahpeton Tribes of Sioux Indians, in Indian Claims Commission dockets numbered 142, 359, 360, 361, 362, and 363, together with interest thereon, after payment of attorney fees and litigation expenses and the costs of carrying out the provisions of sections 1300d to 1300d-9 of this title, shall be distributed as provided in such sections.

Section 1300d-3. (a) The Devils Lake Sioux Tribe of North Dakota, and the Sisseton and Wahpeton Sioux Tribe of South Dakota, shall bring current their membership rolls of October 25, 1972. The Assiniboiné and Sioux Tribes of the Fort



Peck Reservation, Montana, shall prepare rolls of their members who are lineal descendants of the Sisseton and Wahpeton Mississippi Sioux Tribe, who were born on or prior to and are living on October 25, 1972, and who are entitled to enrollment on their respective membership rolls in accordance with the applicable rules and regulations of the tribe or group involved, using available records and rolls at the local agency and area offices, and any other available records and rolls. Applications for enrollment must be filed with each group named in this section and such rolls shall be subject to approval of the Secretary of the Interior. The Secretary's determination on all applications for enrollment shall be final.

(b) The Secretary of the Interior shall prepare a roll of the lineal descendants of the Sisseton and Wahpeton Mississippi Sioux Tribe who were born on or prior to and are living on October 25, 1972, whose names or the name of a lineal ancestor appears on any available records and rolls acceptable to the Secretary, and who are not members of any of the organized groups listed in subsection (a) of this section. Applications for enrollment must be filed with the Area Director, Bureau of Indian Affairs, Aberdeen, South Dakota. The Secretary's determination on all applications for enrollment shall be final.

Section 1300d-4. (a) After deducting the amount authorized in section 1300d of this title, the funds derived from the judgment awarded in Indian Claims Commission docket numbered 142 and the one-half remaining from the amount awarded

in docket numbered 359, plus accrued interest, shall be apportioned on the basis of reservation residence and other residence shown on the 1909 McLaughlin annuity roll, as follows:

Tribe or Group	Percentage
Devils Lake Sioux of North Dakota.....	21.6892
Sisseton-Wahpeton Sioux of South Dakota.....	42.9730
Assiniboiné and Sioux Tribe of the Fort Peck Reserva- tion, Montana.....	10.3153
All other Sisseton and Wahpeton Sioux.....	25.0225

(b) The shares of the Devils Lake Sioux Tribe of North Dakota, the Sisseton and Wahpeton Sioux Tribe of South Dakota, and the Assiniboiné and Sioux Tribe of the Fort Peck Indian Reservation, Montana, as apportioned in accordance with subsection (a) of this section, shall be placed on deposit in the United States Treasury to the credit of the respective groups. Seventy per centum of such funds shall be distributed per capita to their tribal members: Provided, That none of the funds may be paid per capita to any person whose name does not appear on the rolls prepared pursuant to section 1300d-3(a) of this title. The remainder of such funds may be advanced, deposited, expended, invested, or reinvested for any purpose designated by the respective tribal governing bodies and approved by the Secretary of the Interior: Provided, That, in the case of the Assiniboiné and Sioux Tribe of the Fort Peck Reservation, Montana, the Fort Peck Sisseton-Wahpeton Sioux Council shall act as the governing body in determining

the distribution of funds allotted for programing purposes: Provided further, That the Sisseton-Wahpeton Sioux Tribe of South Dakota shall act in concert with its membership residing in the Upper Sioux Community in Minnesota and its membership affiliated with the Urban Sisseton-Wahpeton Council of the Minneapolis-Saint Paul area in jointly submitting programing proposals to the Secretary.

(c) The funds allocated to all other Sisseton and Wahpeton Sioux, as provided in subsection (a) of this section, shall be distributed per capita to the persons enrolled on the roll prepared by the Secretary pursuant to section 1300d-3(b) of this title.

4. 28 U.S.C. section 2401(a).

Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

Supreme Court, U.S.

FILED

AUG 24 1990

JOSEPH F. SPANIOL, JR.  
CLERK

No. 89-2015

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**In the Supreme Court of the United States**

OCTOBER TERM, 1990

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SISSETON-WAHPETON SIOUX TRIBE,  
ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*

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**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

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EDWARD J. SHAWAKER  
M. ALICE THURSTON  
*Attorneys*

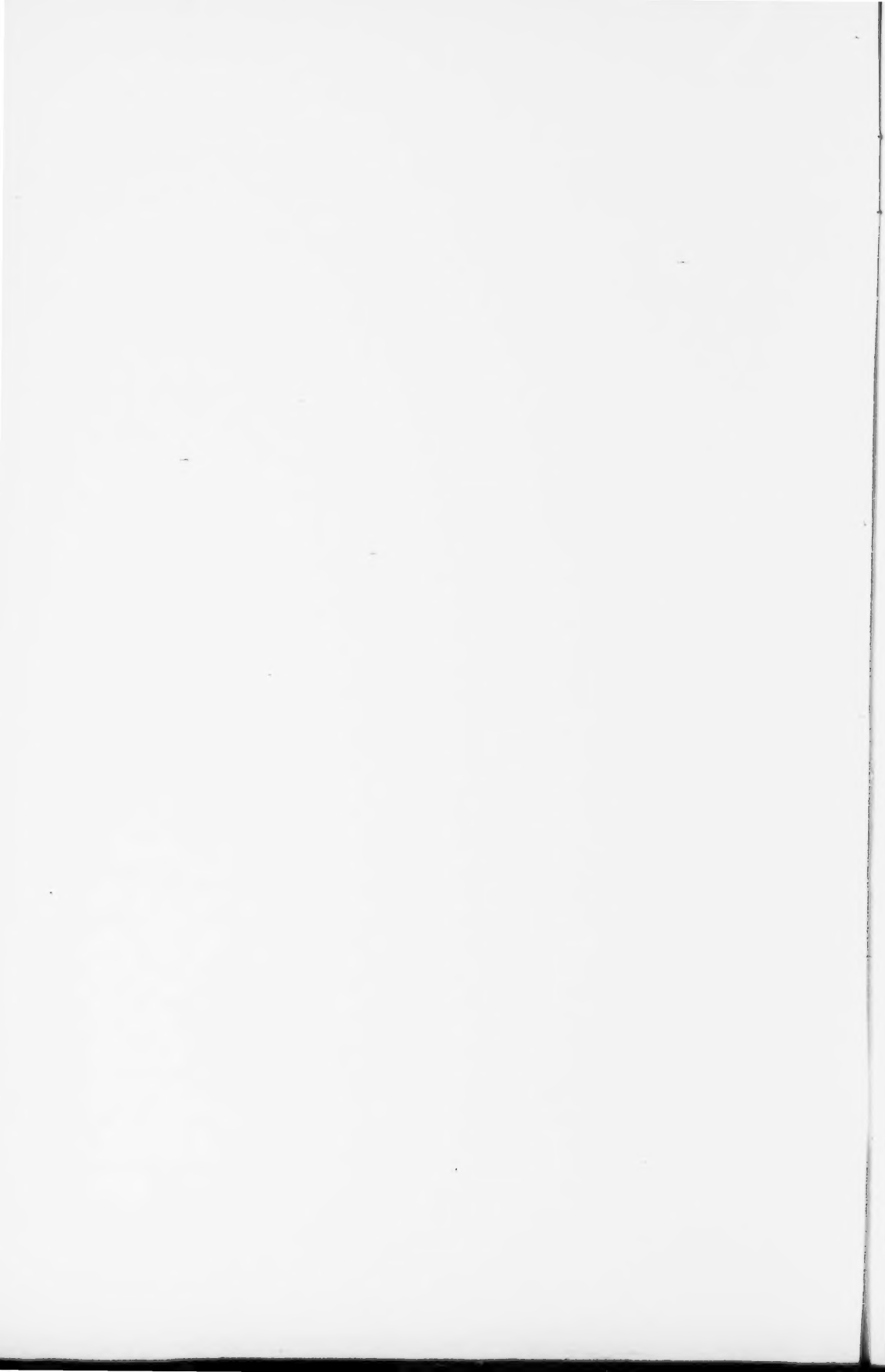
*Department of Justice  
Washington, D.C. 20530  
(202) 514-2217*

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**BEST AVAILABLE COPY**

### **QUESTION PRESENTED**

Whether claims challenging certain provisions of a federal statute enacted in 1972 to provide for the distribution of a judgment of the Indian Claims Commission are barred by the six-year statute of limitations of 28 U.S.C. 2401(a).



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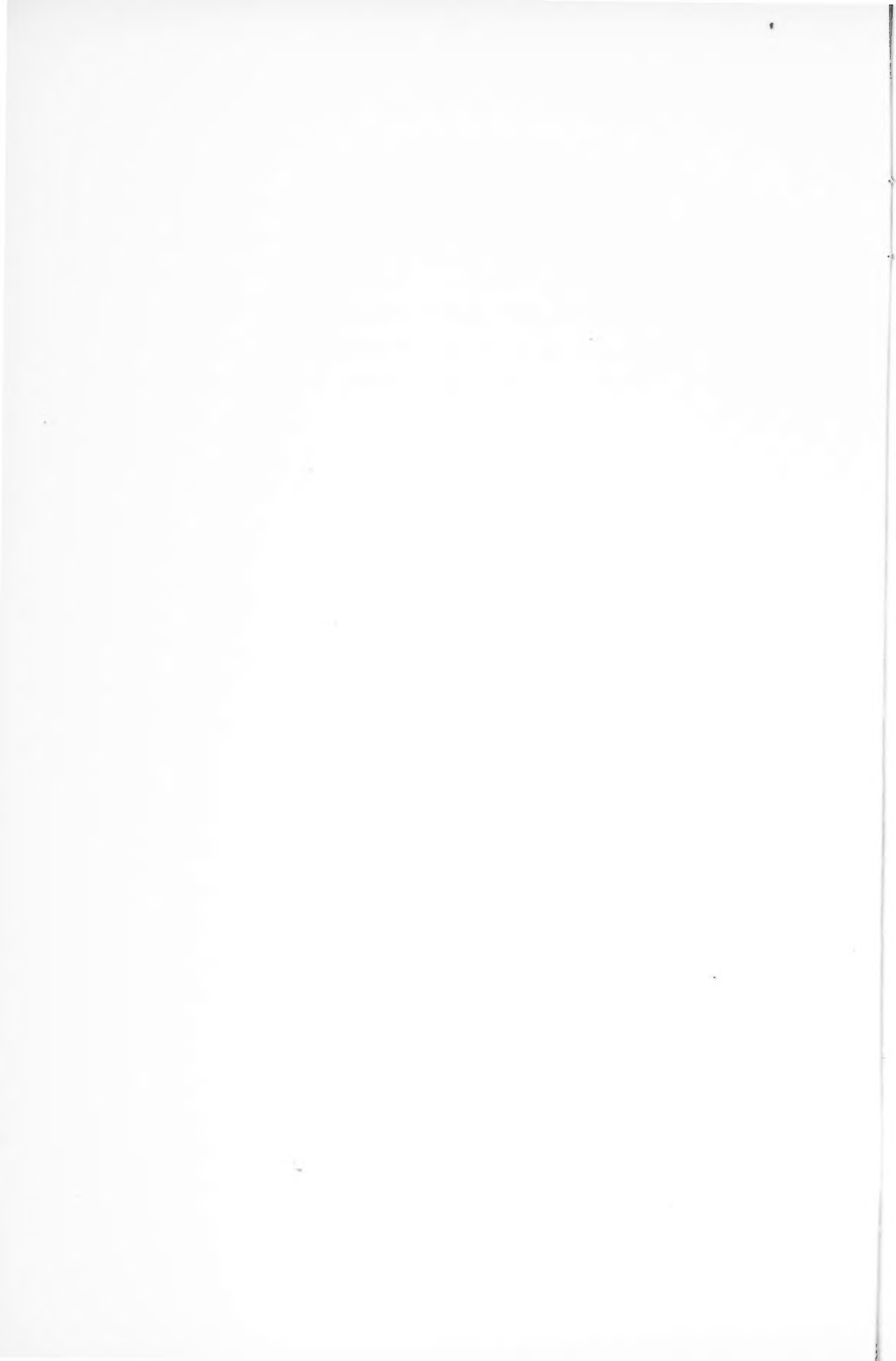
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# **In the Supreme Court of the United States**

OCTOBER TERM, 1990

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*

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**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

---

## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1-16) is reported at 895 F.2d 588. The opinion of the district court (Pet. App. 17-47) is reported at 686 F. Supp. 831.

## **JURISDICTION**

The judgment of the court of appeals was entered on February 2, 1990. A petition for rehearing was denied on March 5, 1990. Pet. App. 49. On May 14, 1990, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including June 20, 1990. The petition was filed on June 18, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioners filed claims against the United States under the Indian Claims Commission Act, ch. 959, 60 Stat. 1049, codified at 25 U.S.C. 70 *et seq.* (1976).<sup>1</sup> Petitioners sought compensation for some 27 million acres of land ceded to the United States by the Treaties of July 23, 1851, 10 Stat. 949, and July 15, 1830, 7 Stat. 328. In 1967, petitioners and the United States agreed to settle the claims for about \$6 million. The settlement agreement was filed with Congress and entered as a final judgment of the Indian Claims Commission in July 1967. See *Sisseton and Wahpeton Bands or Tribes v. United States*, 18 Indian Cl. Comm. 526-1. Congress appropriated funds to satisfy the judgment. Act of June 19, 1968, Pub. L. No. 90-352, 82 Stat. 239. The funds were deposited in an interest-bearing account of the United States Treasury. Pet. App. 2-3.

In 1972, Congress, following its usual practice in tribal claims cases, passed legislation to establish a plan for distributing the judgment fund. Act of Oct. 25, 1972, Pub. L. No. 92-555, 86 Stat. 1168, codified at 25 U.S.C. 1300d *et seq.* (Distribution Act).<sup>2</sup> The Distribution Act allocated the judgment fund roughly as follows: 43% to the Sisseton-Wahpeton Sioux of South Dakota; 22% to the Devil's Lake Sioux, 10% to the Assiniboine and Sioux Tribe, and approximately 25% to "[a]ll other Sisseton and Wahpeton Sioux." 25 U.S.C. 1300d-4(a); Pet. App. 51-52.

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<sup>1</sup> The Indian Claims Commission Act established the Indian Claims Commission as a forum for adjudicating tribal claims against the United States that accrued before August 13, 1946. See 25 U.S.C. 70a (1976). In 1978, Congress dissolved the Indian Claims Commission and transferred unresolved tribal claims to the Court of Claims (succeeded for this purpose by the Claims Court). See Act of Oct. 8, 1976, Pub. L. No. 94-465, § 2, 90 Stat. 1990.

<sup>2</sup> Portions of the Distribution Act are set out at Pet. App. 50-53.

The "other Sisseton and Wahpeton Sioux" are lineal descendants of Sisseton and Wahpeton Sioux who are not themselves members of any of the petitioner Tribes. The Senate Report accompanying the Distribution Act explains that Congress allocated 25% of the judgment fund to non-members of the petitioner Tribes because, "[w]hile it is clear that these successor tribes [*i.e.*, petitioners] exist and are representative of the aggrieved aboriginal bands, historical evidence confirms that there are additional descendants who are not enrolled with these successor tribes, but are entitled to share in the proceeds of the award." S. Rep. No. 144, 92d Cong., 1st Sess. 2-3 (1971). Petitioners participated in developing the distribution plan and endorsed the Distribution Act. See Pet. App. 5; see also S. Rep. No. 144, *supra*, at 2-3 ("All of the concerned Indian groups endorse this method of apportionment and distribution of the judgment funds.").

The Distribution Act directed the Secretary of the Interior to prepare a roll of lineal descendants and to distribute, on a per capita basis, roughly 25% of the judgment fund to the individuals whose names were included on the roll. See 25 U.S.C. 1300d-3(b), 1300d-4(c); Pet. App. 50-53. The Secretary completed preparation of the roll of 1,970 lineal descendants in April 1987 and scheduled payment for May 1987. Pet. App. 4; Pet. C.A. Br. 6.

In April 1987, shortly before the scheduled distribution, petitioners brought this action in the United States District Court for the District of Montana, seeking to prevent payment of any portion of the judgment fund to non-members of the petitioner Tribes. Petitioners alleged that the judgment of the Indian Claims Commission made no provision for payments to individuals other than tribal members, and that the Distribution Act deprived peti-

tioners of their vested right to receive the entire judgment fund.<sup>3</sup>

2. The district court granted petitioners' request for a preliminary injunction enjoining the distribution, but subsequently held that petitioners' claims were barred by the six-year statute of limitations of 28 U.S.C. 2401(a). Pet. App. 17-47. The court observed that Section 2401(a) by its terms applies to "every 'civil action' commenced against the United States." The statute places a condition on Congress's waiver of sovereign immunity, and therefore limits the court's jurisdiction to hear claims against the United States. Pet. App. 31-32 (citing *Block v. North Dakota*, 461 U.S. 273, 287 (1983)). Moreover, the court observed, federal statutes of limitations generally apply to Indian claims. Pet. App. 36-37 & n.2 (citing authorities). Accordingly, the district court held that Section 2401(a) applies to petitioners' claims.

The court also held that petitioners' claims accrued in 1972, when the Distribution Act was passed. Because "[t]he gravamen of [petitioners'] amended complaint is that the Distribution Act \* \* \* improperly deprive[s] [petitioners] of their property" (Pet. App. 39), the court held that the six-year period allowed by Section 2401(a) expired in 1978.<sup>4</sup> Pet. App. 42-43.

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<sup>3</sup> Petitioners contended that distribution of any portion of the judgment fund to non-members would violate the Due Process and Just Compensation Clauses of the Fifth Amendment, as well as the Indian Claims Commission Act and the Act of June 19, 1968 appropriating monies to pay the judgment. Petitioners also alleged that the Distribution Act breached their settlement agreement with the government and violated the trust responsibility of the United States to petitioners. Pet. App. 20.

<sup>4</sup> The district court also held that petitioners' amended complaint failed to state an independent claim against the federal officials named as defendants in petitioners' complaint, and that consequently peti-

3. The court of appeals affirmed. Pet. App. 1-16. The court concluded that each of petitioners' arguments against application of Section 2401(a) "run[s] up against the same obstacle: the 1972 Distribution Act explicitly made the allocations that [petitioners] now allege violated their rights, and the effect and terms of the Act were hardly obscure." Pet. App. 5. Petitioners, moreover, "fail[ed] to explain why they waited fifteen years to challenge the government's clear and explicit decision to award part of the fund to nonmembers." *Ibid.*

The court of appeals rejected petitioners' argument that this action is analogous to a suit to enforce a judgment such as *United States v. Taylor*, 104 U.S. 216 (1881). In *Taylor*, in contrast to this case, the statute of limitations did not bar the claim because the claimant had no reason to believe the government would not pay the claim. Pet. App. 7-8. The court also held that application of Section 2401(a) to petitioners' claims is not contrary to the Indian Claims Commission Act. Although that Act permitted Indian tribes to pursue claims that accrued long before 1946, it did not repeal the statute of limitations on claims accruing *after* 1946. Pet. App. 8-9.

The court of appeals rejected petitioners' arguments that their claims did not accrue until the Secretary completed the roll of lineal descendants in April 1987. Publication of the roll was irrelevant to petitioners' claims, the court held, because those claims are based on Congress's decision in 1972 to allocate 25% of the judgment fund to non-members. Finally, the court held, changes in the law did not justify tolling the statute. Nor did the "scant" precedent for equitable tolling justify tolling where, as here, the challenged action was known to all concerned in

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tioners' claims against those defendants also were time-barred. Pet. App. 46 n.3.

1972 and the dispute pits one group of Indians against another.<sup>5</sup>

### ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any court of appeals. Further review is therefore not warranted.

1. Section 2401(a) of Title 28, the "general statute of limitations governing actions against the United States," *United States v. Mottaz*, 476 U.S. 834, 838 (1986), provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 476 U.S. at 839. Petitioners do not deny that this is a "civil action" within the meaning of Section 2401(a). Nor do they dispute the basic principle that statutes of limitations on claims against the United States place a condition on the government's waiver of sovereign immunity. Such statutes "must be strictly observed, and exceptions \* \* \* are not to be lightly implied." See *Block v. North Dakota*, 461 U.S. at 287. And this Court has specifically stated that, "even for Indian plaintiffs, [a] waiver of sovereign immunity "cannot be lightly implied but must be unequivocally expressed." ' ' ' *Mottaz*, 476 U.S. at 851 (quoting *United*

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<sup>5</sup> The court of appeals said that it was unclear from the "muddy and unpersuasive record" created by petitioners whether they were claiming that there are no bona fide descendants of the Sisseton and Wahpeton Sioux on the Secretary's roll, or only that the roll includes some unqualified individuals. Pet. App. 10 n.3 The court indicated that the latter allegation would not support a legal claim by petitioners. As to the former possible allegation, the court held that petitioners' complaint was not clear enough to survive a motion to dismiss, but granted petitioners leave to amend their complaint if they are able to state facts supporting such a claim. Pet. App. 11-12.



*States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)).

2. Petitioners characterize their action as one to enforce a judgment of the Indian Claims Commission, and contend (Pet. 7-11) that Section 2401(a) does not apply to such actions. In particular, petitioners assert that the Distribution Act altered the judgment of the Commission by "seiz[ing] petitioners' vested and exclusive property right in 25% of the funds" in violation of separation of powers principles (Pet. 7-8), and by "confiscat[ing] 25% of the judgment fund" in violation of the Due Process Clause of the Fifth Amendment. Pet. 10. The short answer to these contentions is that the Distribution Act plainly allocated 25% of the judgment fund to non-members in 1972. Thus, any separation of powers or due process claims that petitioners may have had accrued in 1972 and should have been pursued within the next six years. There is no plausible argument that applying a reasonable statute of limitations such as Section 2401(a) to constitutional claims against the government is itself unconstitutional. On the contrary, this Court has held that constitutional claims are subject to statutes of limitations. See, e.g., *United States v. Mottaz*, 476 U.S. at 843-844.

In any event, petitioners' arguments rest on a false premise: the Distribution Act did not alter the judgment of the Indian Claims Commission. The Commission's judgment, like other judgments under the Indian Claims Commission Act, was not self-executing. Congress, following its standard practice in such cases, appropriated funds to satisfy the judgment and adopted a plan for distribution of the funds.<sup>6</sup> This Court has recognized that Congress

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<sup>6</sup> Prior to October 1973, Congress passed special legislation approving plans to distribute Indian Claims Commission judgments. See, e.g., Act of Sept. 27, 1967, Pub. L. No. 90-93, §§ 4-5, 81 Stat. 229

has broad power to adopt such distribution plans as long as they are "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 85 (1977) (quoting *Morton v. Mancari*, 417 U.S. 535, 555 (1974)).

In this case, Congress's decision to allocate 25% of the fund to non-member lineal descendants of the Sisseton-Wahpeton Sioux is entirely reasonable in light of its determination that petitioners do not represent all the descendants of the aboriginal bands affected by the Treaties of July 23, 1851 and July 15, 1830. In sum, the Distribution Act was consistent with the judgment of the Indian Claims Commission, and was well within Congress' broad powers to determine "whether specific individuals, classes of persons, or subgroups saying that they are members or components of the prevailing group are entitled to participate in the judgment." *Turtle Mountain Band of Chippewa Indians v. United States*, 490 F.2d 935, 951 (Ct. Cl. 1974) (quoting *Cherokee Freedmen v. United States*, 195 Ct. Cl. 39, 46 (1971)). See generally R. Strickland, et al., *Cohen's Handbook of Federal Indian Law* 572-574 (1982).

3. Petitioners also contend (Pet. 11-15) that application of Section 2401(a) to bar their claims is contrary to the Indian Claims Commission Act. Neither the language nor the purpose of that Act supports this contention. The

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(codified at 25 U.S.C. 1141); Act of Oct. 14, 1966, Pub. L. No. 89-660, § 2, 80 Stat. 911 (codified at 25 U.S.C. 1132); Act of July 17, 1959, Pub. L. No. 86-97, § 2, 73 Stat. 222 (codified at 25 U.S.C. 912). Since October 1973, plans for distributing tribal claims judgments have been developed according to the procedures set out in the Act of Oct. 19, 1973, Pub. L. No. 93-134, 87 Stat. 466 (codified as amended at 25 U.S.C. 1401-1407) (requiring Secretary to develop, for submission to Congress, a distribution plan in consultation with affected tribes).

Indian Claims Commission Act authorized the Indian Claims Commission to hear tribal claims accruing *before* 1946, notwithstanding any statute of limitations that might otherwise have barred such claims. See 25 U.S.C. 70a (1976). But the Act expressly provided that “[n]o claim accruing after August 13, 1946, shall be considered by the Commission,” *ibid.*, and further required that all tribal claims be filed by 1951. See 25 U.S.C. 70k (1976). Consequently, the express provisions of the Indian Claims Commission Act refute petitioners’ contention that tribal claims against the United States accruing after 1946 are not subject to any statute of limitations.<sup>7</sup>

Nor is application of Section 2401(a) to petitioners’ claims inconsistent with the purpose of the Indian Claims Commission Act. The “chief purpose of that Act was to dispose of the Indian claims problem with finality.” *United States v. Dann*, 470 U.S. at 45 (quoting H.R. Rep. No. 1466, 79th Cong., 1st Sess. 10 (1945)). A secondary purpose of the Act was “to transfer from Congress to the Indian Claims Commission the responsibility for determining the merits of native American claims.” 470 U.S. at 45. As the court of appeals observed (Pet. App. 9), even if Congress “intended to open wider the door to federal court especially for Indians to assert claims based on wrongs that occurred when their lands were taken, imposing no time limit on challenges to the distribution plans

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<sup>7</sup> The judgment of the Indian Claims Commission in this case was paid in 1968 when the funds were appropriated by Congress and placed in an interest-bearing Treasury account. See *United States v. Dann*, 470 U.S. 39, 45 (1985). And the Indian Claims Commission Act provided that “payment of any claim \* \* \* shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.” 25 U.S.C. 70u(a) (1976). Thus, petitioners are barred from arguing that the claims they now seek to litigate are the same as their original claims filed with the Commission.

further none of these purposes." Indeed, acceptance of petitioners' argument that no statute of limitations applies to their claims would undermine the Act's purpose of resolving tribal claims with finality.

4. Petitioners argue, in the alternative (Pet. 15-22), that their claims did not accrue until the Secretary completed the roll of lineal descendants in 1987. This argument fails because, as both courts below found, petitioners' claims turn on Congress's decision to distribute 25% of the judgment fund to a class of non-members rather than on the particular identity of the non-members the Secretary has declared eligible to participate in the distribution. Thus, as the court of appeals observed, the alleged "mistakes and 'new' information the Tribes point to \* \* \* simply are irrelevant to their challenge to the 1972 Distribution Act's award of money to lineal descendants." Pet. App. 10.

This Court's decision in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977), does not support petitioners. As an initial matter, *Weeks* was decided some 13 years ago, and thus any argument that petitioners' cause of action did not accrue until *Weeks* was decided cannot alter the conclusion that petitioners' claims are now time-barred. In any event, contrary to petitioners' contention (Pet. 16), *Weeks* did not hold that "distribution of [Indian Claims Commission] judgment funds to persons who have no affiliation with the judgment creditor tribe" is unconstitutional. In *Weeks*, the Court upheld, against an equal protection challenge, a distribution statute that excluded a group of descendants of the Delaware Indians who had settled in Kansas and were no longer members of an Indian tribe. The Court concluded that the exclusion was justified as "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." 430 U.S. at 85. That Congress may reasonably exclude a class of

persons who are not tribal members from sharing in a judgment of the Indian Claims Commission does not mean that Congress may not reasonably include such persons in a distribution plan. Indeed, the statute upheld in *Weeks* expressly included in the distribution certain other individuals who were not members of any present-day tribe. See 430 U.S. at 82 n.14; see also *id.* at 90 (Blackmun, J., concurring). An inclusive distribution plan is fully justified where, as here, Congress has determined that the successor Tribes do not represent all the descendants of the aggrieved aboriginal bands.<sup>8</sup>

Finally, petitioners err in relying on *United States v. Wurts*, 303 U.S. 414 (1938). Petitioners cite *Wurts* for the proposition that a statute of limitations does not begin to run until an erroneous payment is made. Pet. 20. But *Wurts* construed a 1928 statute that barred suits by the United States to recover amounts erroneously refunded to taxpayers unless such suits were brought within two years "after the making of such refund." 303 U.S. at 415. The Court held, based on the language of the 1928 statute, that the government's right to recover accrued, and the statute of limitations began to run, on the date the refund was paid rather than on the date the refund was "allowed." *Id.* at 418. Section 2401(a) does not refer to the making of a refund, but rather to the time "the right of action first

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<sup>8</sup> Contrary to petitioners' assertions (Pet. 18-19), neither *United States v. Dann*, *supra*, nor *Lewis v. Hawkins*, 90 U.S. (23 Wall.) 119 (1874), stands for the proposition that repudiation of a trust fund does not occur until the government identifies the individuals that it deems eligible to receive the funds. The Distribution Act clearly "repudiated" any claim petitioners might have to the 25% of the judgment fund at issue, and petitioners' right of action, if any, therefore accrued in 1972. Cf. *United States v. Mottaz*, 476 U.S. at 841-844 (claim against United States accrued when claimant "should have known" of the claim).

accrues." Accordingly, as the court of appeals said, "[t]he allocation of funds rather than a demand for payment \* \* \* was the triggering event that commenced the running of the statute of limitations." Pet. App. 8.

### CONCLUSION

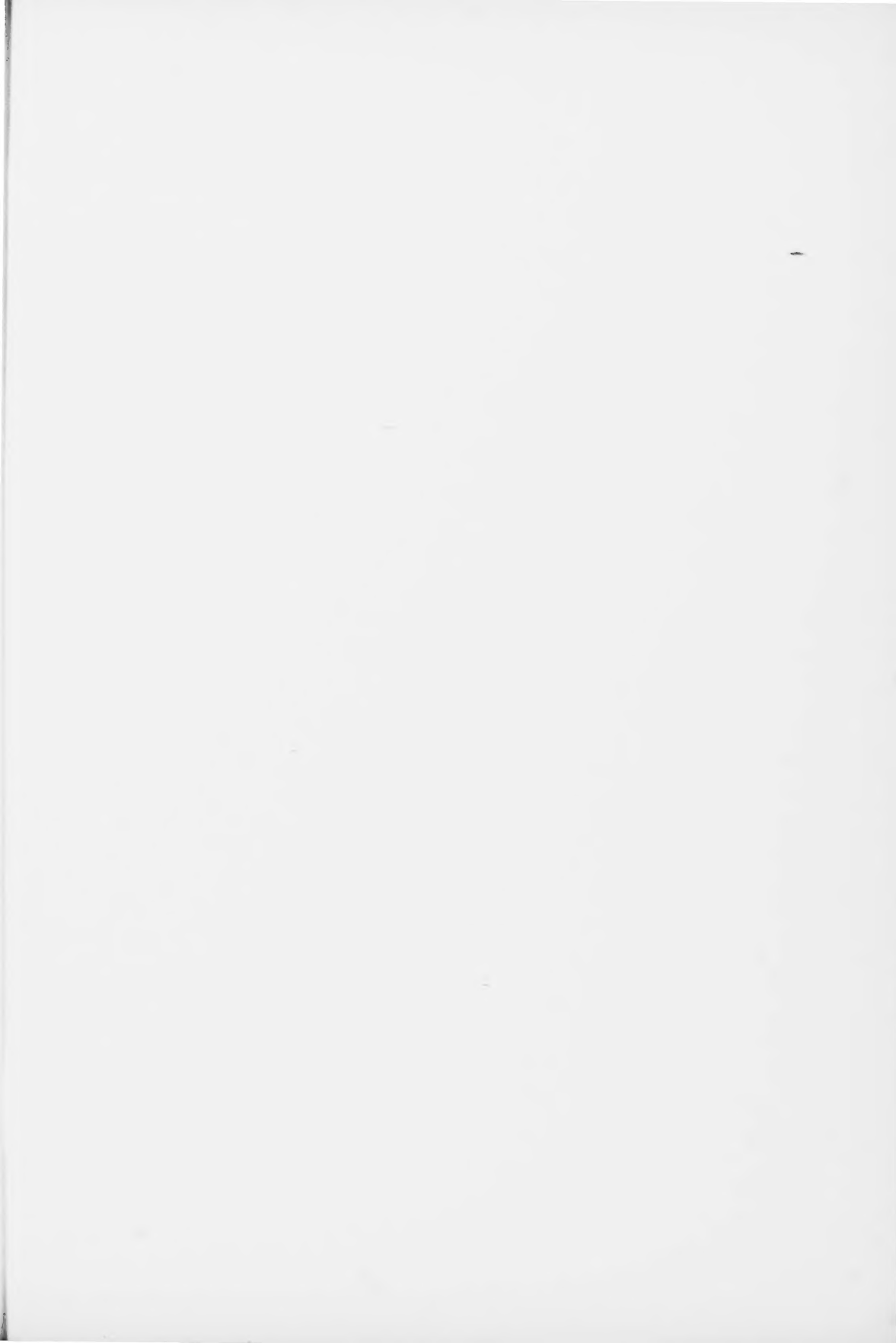
The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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AUGUST 1990



No. 89-2015

Supreme Court, U.S.  
FILED

SEP 20 1990

JOSEPH F. SPANJOL, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1989

SISSETON-WAHPETON SIOUX TRIBE, of the  
Lake Traverse Indian Reservation, North Dakota and  
South Dakota; DEVILS LAKE SIOUX TRIBE, of the  
Devils Lake Sioux Indian Reservation, North Dakota;  
SISSETON-WAHPETON SIOUX COUNCIL, of the  
Assiniboine and Sioux Tribes of the  
Fort Peck Indian Reservation, Montana,

*Petitioners,*

v.

UNITED STATES OF AMERICA; DONALD P. HODEL,  
Secretary of the Interior; JAMES A. BAKER,  
Secretary of the Treasury,

*Respondents.*

REPLY TO BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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## SUPPLEMENT TO STATEMENT OF THE CASE <sup>1</sup>

1. In the underlying action, Sisseton and Wahpeton Bands or Tribes v. United States, 10 I.C.C. 137 (1962), the Indian Claims Commission (hereinafter "Commission") determined that petitioners "are entitled to bring and maintain the claims...for and on behalf of its members and all other descendants of the original bands of Sisseton and Wahpeton Sioux." Id. at 180. When the claims were settled by stipulation, the Department of Justice, the Department of the Interior and the Commission required approval of the settlement only by petitioners and their members. The settlement, as approved by the parties and in the Commission's judgment, recognized petitioners' sole entitlement to the judgment awarded. Petitioners' action

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<sup>1</sup> A supplement is necessitated by the Government's inaccurate representation of certain facts.

seeks to guarantee that the judgment fund is distributed, as ordered by the Commission, only to petitioners and their members.<sup>2</sup>

2. Petitioners did not participate in developing the distribution to lineal descendants adopted in the Act of October 25, 1972, 86 Stat. 1168, 25 U.S.C. 1300d et seq. (Pet.App. at 50-53), and endorsed the distribution only when their hands were forced. In 1970, when Congress first considered a measure for the distribution of the judgment fund involved here, the bill proposed that 100% of the fund be distributed to Sisseton-Wahpeton Sioux

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<sup>2</sup> The dispute does not "pit[] one group of Indians against another." Resp.Br. at 6. The dispute is between petitioners and the United States. The action seeks to compel the United States to honor a judgment rendered against it and to prevent the United States from distributing a portion of the judgment fund to persons with no legitimate claim to or interest in such fund.

lineal descendants. Despite the fact that petitioners, then as now, were federally recognized tribes, the proposal was based on Department of the Interior representations that there were no successor tribal entities to the aboriginal Sisseton and Wahpeton Sioux Tribes. H.Rep.No. 1150, 91st Cong. 2d Sess. 3 (1970); 116 Cong.Rec. 19722 (June 15, 1970). In 1972, the Department corrected this mistake. H.Rep.No. 1369, 92d Cong. 2d Sess. 3-4, 8 (1972); S.Rep.No. 144, 92d Cong. 1st Sess. 2, 4 (1971); 118 Cong.Rec. 30640 (October 13, 1972). The Department, though, continued to support a distribution of part of the judgment fund to lineal descendants because, it was claimed, individuals not members of the petitioner tribes existed who could trace lineal descent from members of the aboriginal Sisseton and Wahpeton Sioux Tribes.

S.Rep.No. 144, supra, at 5. The Department acknowledged, however, that the lineal ancestors of these individuals had severed all relations with the aboriginal Tribes. Id. at 4-5.

Petitioners opposed a lineal descendancy distribution. S.Rep.No. 1339, 91st Cong. 2d Sess. 8 (1970) ("Those who are members of the modern entities listed in the bill feel that [tribal] membership plus lineal descendancy should be the criteria for sharing in the award"); "Distribution of Funds Awarded the Sisseton-Wahpeton Tribes of Sioux Indians by the Indian Claims Commission in 1967," Hearing before the Select Committee on Indian Affairs, United States Senate, 99th Cong. 2d Sess. 61-62 (1986) (hereinafter "1986 Senate Hearing") ("It was a collective position of the tribes that lineal descendants did not belong in the legislation for distribution

of money"). Petitioners ultimately were forced to acquiesce in the distribution to lineal descendants, out of a desperate need for money, only when it became evident that absent such acquiescence no bill would pass. Id.

3. The Department of the Interior now opposes the distribution to lineal descendants at issue here. The Department maintains that where a tribal entity exists that is the successor to the aboriginal tribe whose lands were taken, national policy recognizes the sole right of such tribe to a Commission award. The Department also holds that lineal descendency distributions contravene the federal objective of tribal self-determination. 1986 Senate Hearing, supra, at 9, 28; S.Rep.No. 468, 99th Cong. 2d Sess. 5 (1986).

## ARGUMENT

1. Respondent argues that "any separation of powers or due process claims that petitioners have had accrued in 1972." Resp.Br. at 7. The argument begs the question of whether application of the statute of limitations, 28 U.S.C. 2401(a), itself violates the separation of powers doctrine or petitioners' due process rights. Pet. at 7-11. With respect to the separation of powers question, in particular, this Court has framed the question as whether "Congress impermissibly has disturbed the finality of a judicial decree by rendering the...earlier judgments in this case mere advisory opinions." United States v. Sioux Nation of Indians, 448 U.S. 371, 391 (1980). Sioux Nation affirms that the Congress breaches the constitutional separation of powers whenever it reviews the merits of a



judicial decision and acts to reverse or otherwise alter a judicial judgment. Id. at 407. Here Congress, in the 1972 Distribution Act, has not only reviewed the merits of the Commission's finding that petitioners represented all of the descendants of the aboriginal Sisseton and Whapeton Sioux Tribes,<sup>3</sup> and partially

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<sup>3</sup> Respondent reasons that the 1972 Act did not alter the Commission's judgment because Congress determined that "petitioners do not represent all the descendants of the aboriginal bands affected." Resp.Br. at 7-8. However, this congressional finding directly conflicts with the Commission's judicial determination of the matter. The Commission's judgment awarding 100% of the amount awarded to petitioners was based on this determination. Moreover, this Court has determined in Delaware Tribal Business Committee, v. Weeks, 430 U.S. 73, 85 (1977), that tribes, not individuals, are entitled to Commission awards, and that the lineal descendants of persons who had severed all relations with the aboriginal tribe are not constitutionally entitled to share in such awards, 430 U.S. at 86-87, 89 n. 2. Accordingly, the statute at issue in Weeks was upheld even though the distribution included nonmembers of the tribe because, unlike here, the nonmembers had either a close affiliation with the tribe or ancestors who had not severed

reversed the Commission's judgment awarding 100% of the judgment to petitioners. See also, Sioux Nation, 448 U.S. at 427 (Rehnquist, J., dissenting)("Congress is vested by Art. I with legislative powers, and may not itself exercise an appellate-type review of judicial judgments in order to alter their terms"). According to the courts below, Congress has also imposed a statute of limitations applicable to actions to enforce judgments and to secure the rights granted therein. Applying section 2401(a) to such an action, at least has "interfered with...[the Commission's] judicial function in deciding the merits of the [petitioners'] claims," Sioux Nation,

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their tribal relations. See Resp. Br. at 11. Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 951 (Ct.Cl. 1974), is not, as respondent contends (Resp. Br. at 8), contrary because the "lineal descendants" here are not "members or components of the prevailing group."

448 U.S. at 406, if not imposed "'control [over] the exercise of...judicial power,'" Pope v. United States, 323 U.S. 1, 8-9 (1944), quoted in Sioux Nation, 448 U.S. at 428 (Rehnquist, J., dissenting). By applying section 2401(a) to bar the judgment enforcement action here, the finality of the Commission's decree is disturbed, not protected.

2. In answering petitioners' argument that application of section 2401(a) to bar petitioners' claims is contrary to the Indian Claims Commission Act, respondent states that petitioners' claims arose after 1946 and, therefore, are not subject to the statute of limitations waiver contained in that Act. Resp.Br. at 8-10. Respondent further attacks petitioners' argument on the ground that permitting their action to proceed would undermine the purpose of the Act to "resolv[e] tribal claims with

finality." Id. at 10.

While the final resolution of claims was indeed a goal of the Act, the Congress stressed that the Act was achieve finality with justice. Application of section 2401(a) to bar petitioners' claims does not resolve petitioners' claims or achieve finality; it simply precludes petitioners' from prosecution of their claims and perpetuates the very injustice that the Act was passed to remedy. While acknowledging that in 1968 petitioners were paid the amounts awarded in the 1967 Commission judgment (Resp.Br. at 9 n. 7), respondent is apparently content to take 25% of petitioners' judgment fund and disburse it in violation of petitioners' vested property rights. This is not what the Act intended.

More importantly, unless form is elevated over substance, petitioners'

claims did not accrue after 1946. The claim that petitioners alone are entitled to the 25% set aside for lineal descendants in 1972 is part of and a continuation of the claim and case before the Commission. Petitioners' judgment enforcement action is simply a subsequent proceeding within the Commission case just as such an enforcement action would be in any other judicial proceeding.

3. Opposing petitioners' alternative contention that their claims did not accrue until 1987, respondent states that petitioners' claims "turn on Congress's decision to distribute 25% of the judgment fund to a class of non-members rather than on the particular identity of the non-members." Resp.Br. at 10. This is simply wrong because the class of non-members is identified in the 1972 Distribution Act as "All other Sisseton and Wahpeton Sioux" and

petitioners' claim is that the distribution that the Secretary of the Interior intends to make is to non-Sisseton and Wahpeton Sioux. This claim could only first be asserted in 1987 when the identities of the distributees became known. Prior to that time, it remained possible that the distributees would be persons eligible under the 1972 Act. For the same reason and contrary to respondent's position (Resp.Br. at 11 n. 8), the repudiation of the trust fund by the Government did not occur until 1987.

### CONCLUSION

For all of the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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